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## **Pride and Prejudice: Lessons Legal Writers Can Learn from Literature**

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## Pride and Prejudice: Lessons Legal Writers Can Learn from Literature

Cover Page Footnote

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# **PRIDE AND PREJUDICE: LESSONS LEGAL WRITERS CAN LEARN FROM LITERATURE**

*Michele G. Falkow*<sup>1</sup>

## **I. INTRODUCTION**

Many legal educators believe that the study of law is like that of no other discipline. They urge students to put aside all forms of analysis, reasoning and argument learned in college; they insist that law students must learn new forms and develop different ways of thinking. Professors who lead students to accept this approach do them a great disservice, for not only does law share with other disciplines many forms of analysis, reasoning and argument, but the study of law benefits from analogies to other subjects.

Nowhere is this prejudice against all that is not law more apparent than in a first-year student's initial attempts at legal writing. In a proud effort to demonstrate that he or she understands the unique quality of legal analysis, the law student will forget basic techniques of sound expository writing. Out go active verbs and concrete description, in come passive constructions and aimless abstractions: "There was a duty of reasonable care under the circumstances which was owed by the

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landowner to the plaintiff when there was foreseeability of the plaintiff's presence on said property."<sup>2</sup> A student who can only think and write in general rules reminds me of *Middlemarch*'s Mr. Casaubon, described by another character in George Eliot's novel as a man who "dreams footnotes, and they run away with all his brains. They say, when he was a little boy, he made an abstract of 'Hop 'o my Thumb,' and he has been making abstracts ever since."<sup>3</sup> A drop of his blood, she said, when studied "under a magnifying glass . . . was all semicolons and parentheses."<sup>4</sup>

In my classroom, I combat the onslaught of poor legal writing in part by using non-legal examples to illustrate concepts of good legal writing. By showing my students excerpts from other disciplines that demonstrate the techniques described in their legal writing textbooks, I accomplish two goals: first, I teach them that all these new ways of thinking, analyzing, and synthesizing should augment rather than replace the skills they already possess; second, I teach them legal writing techniques more effectively by using examples that are familiar rather than foreign, which all law is, to a first-year student.<sup>5</sup> And what is more familiar to a student

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<sup>2</sup>All examples of student writing quoted in this article are taken from real student papers I have read. Some are composite sentences, made more extreme to better illustrate my point, but each phrase actually appeared in law student writing.

<sup>3</sup>GEORGE ELIOT, *MIDDLEMARCH* 63 (Bantam Classic ed. 1985) (1872).

<sup>4</sup>*Id.* at 62.

<sup>5</sup>Education literature amply supports the proposition that "analogies . . . allow correlated information to be charted from a source known to the learner onto one that is not known," which makes "unfamiliar matters understandable," Daniel Callison, *Key Words in Instruction: Analogy*, 16(4) SCH. LIBR. MEDIA ACTIVITIES MONTHLY 35 (Dec.1999). Accord Karen Yanowitz, *Using Analogies to Improve Elementary School Students' Inferential Reasoning About Scientific*

who has recently completed a liberal arts undergraduate program than a classic work of fiction? Surely most law students were required, at some point in their academic careers, to read Dickens and Hemingway. By encouraging students to analyze the craft of writing in works they have recently studied and hopefully enjoyed, I seek to engage them in active reading, which can then help them become better writers while simultaneously assuring them that models need not all derive from legal rhetoric.

## II. THE USE OF LITERATURE TO TEACH LEGAL WRITING

### A. Identifying “Great Works” of Literature

My teaching examples until now have been serendipitous. Whenever I came across a useful passage in my leisure reading of books, newspapers, and magazines, I marked it for potential classroom illustration. Recently reflecting on this process, I

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*Concepts*, 101 SCH. SCIENCE & MATHEMATICS 133, 134 (Mar. 2001) (“Students can use their understanding of the principles described in a more familiar context (often referred to as the source domain) to comprehend a relatively unfamiliar (or target) domain.”); see also Keith Baker, *Magic Bullets, Slate, and Stradivarius: Analogies, Research, and Policy Making*, 79 PHI DELTA KAPPAN 402 (1998); Bridget Case, *Using Analogy to Develop an Understanding of Deaf Culture*, 7(3) MULTICULTURAL EDUC. 41 (Spring 2000); J.A. Gallini, *When is an Illustration Worth a Thousand Words?*, 82 J. EDUC. PSYCHOL. 715 (1990); D.F. Halpern et al., *Analogies as an Aid to Comprehension and Memory*, 82 J. EDUC. PSYCHOL. 298 (1990); J.L. Kolodner, *Educational Implications of Analogy*, 52 AM. PSYCHOLOGIST 57 (1997); A. E. Lawson, *The Importance of Analogy*, 30 J. RES. IN SCIENCE TEACHING 1213 (1993); M.A. McDaniel & C.M. Donnelly, *Learning with Analogy and Elaborative Interrogation*, 88 J. EDUC. PSYCHOL. 508 (1996); Todd Silverstein, *Weak vs. Strong Acids and Bases: The Football Analogy*, 77 J. CHEMICAL EDUC. 849 (2000); D.A. Stepich & T.J. Newby,

thought I might organize those teaching examples by methodically studying works like *Great Expectations* and *A Farewell to Arms* and categorizing all the passages I found that illustrated techniques used in legal writing. What I needed was a list of masterpieces: classic novels guaranteed to provide examples of brilliant writing.

To compile my list of novels, I relied on my colleagues in undergraduate institutions. Using the *U.S. News & World Report* rankings of “best” colleges for 2002,<sup>6</sup> I visited the English department websites of the top fifteen or so liberal arts colleges and universities and collected reading lists and syllabi from literature courses. I imposed a few common-sense criteria: (1) nothing predating 1800, since writing styles were too different;<sup>7</sup> (2) no translations, since works originally written in a language other than English would come from very different stylistic and cultural traditions;<sup>8</sup> and (3) nothing that departed dramatically from straight

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*Analogizing as an Instructional Strategy*, 27(9) PERFORMANCE & INSTRUCTION 21 (1988).

<sup>6</sup> *Best National Universities*, U.S. NEWS & WORLD REP., Sep. 23, 2002, at 82; *Best Liberal Arts Colleges*, U.S. NEWS & WORLD REP., Sep. 23, 2002, at 88.

<sup>7</sup> Indeed, several of the 19th century authors whose works are included in this article used different punctuation rules than those prescribed by grammar handbooks today, and also used the passive voice much more extensively than we consider to be appropriate now. I will explain these and other discrepancies as they arise in individual examples.

<sup>8</sup> Not to mention the difficulty of choosing a translation. The decision is easy enough with a late 20th Century work like Gabriel Garcia Marquez' *Love in the Time of Cholera*, whose definitive translation by Edith Grossman appears consistently on literature course reading lists, but is not so easy with earlier works such as *Madame Bovary* and *Anna Karenina* (or *Anna Karenin*, as translators like Rosemary Edmonds prefer), for which almost every reading list I found suggests a different edition from any other list, or suggests no specific edition at all.

narrative prose, since I would find no useful examples.<sup>9</sup> To be considered a classic, a book had to appear on at least two lists. I also decided, for variety's sake, to include only one title per author.<sup>10</sup> I also tried to represent 200 years of writing as evenly as possible, so that my collection was not too heavily weighted between some short span of years.

The resulting "canon" consisted of the following twenty-five books:

Austen, Jane, *Pride and Prejudice* (1813)  
 Bronte, Emily, *Wuthering Heights* (1847)  
 Thackeray, William, *Vanity Fair* (1848)  
 Hawthorne, Nathaniel, *The Scarlet Letter* (1850)  
 Melville, Herman, *Moby Dick* (1850)  
 Dickens, Charles, *Great Expectations* (1861)  
 Eliot, George, *Middlemarch* (1872)

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<sup>9</sup> Apologies, therefore, to James Joyce and William Faulkner. *Ulysses* and *Absalom, Absalom!* appear repeatedly on course syllabi, while works by these authors in a more traditional style do not, so I decided not to include either novelist.

<sup>10</sup> Some authors were spread quite thin with various works, like Edith Wharton and E.M. Forster, so that despite being quite popular, they were in danger of not meeting my criteria. Luckily, no author whose name appeared frequently on the syllabi suffered that fate; all had at least one work that appeared at least twice. The winning entry, so to speak, was Austen's *Pride and Prejudice*, with Eliot's *Middlemarch* and Charlotte Bronte's *Wuthering Heights* close behind. Lest fans of more recent fiction be offended, I also note that 20th Century literature courses include a much greater range of themes, and thus of authors, than do courses covering earlier eras. Almost every school offers a "Nineteenth Century English Novel" survey; fewer include more focused courses like "Modernist Literature in America" in their catalogs. I do not know if Austen, Eliot, and Bronte fuel the popularity of the 19th Century English novel courses, or the reverse. In addition, I recognize that the criteria used by college professors to assemble their reading lists undoubtedly include many factors besides literary merit, such as historical significance of the novel, or of its setting, plot, or author, so my "great books" collection makes no claim of scientific precision. In addition, although my syllabus and reading list research was extensive, it was not exhaustive. My aim was merely to find some patterns, a consensus of fiction worth studying.

James, Henry, *The Portrait of a Lady* (1881)  
 Hardy, Thomas, *Jude the Obscure* (1895)  
 Dreiser, Theodore, *Sister Carrie* (1900)  
 Conrad, Joseph, *The Secret Agent* (1907)  
 Ford, Ford Madox, *The Good Soldier* (1915)  
 Cather, Willa, *My Antonia* (1918)  
 Wharton, Edith, *The Age of Innocence* (1920)  
 Forster, E.M., *A Passage to India* (1924)  
 Hemingway, Ernest, *A Farewell to Arms* (1929)  
 Fitzgerald, F. Scott, *Tender is the Night* (1934)  
 Greene, Graham, *The Heart of the Matter* (1948)  
 Ellison, Ralph, *Invisible Man* (1952)  
 Nabokov, Vladimir, *Lolita* (1955)  
 Bellow, Saul, *Herzog* (1964)  
 Pynchon, Thomas, *The Crying of Lot 49* (1965)  
 Rushdie, Salman, *Midnight's Children* (1980)  
 DeLillo, Don, *White Noise* (1985)  
 Morrison, Toni, *Beloved* (1987)

## B. Application

In the remainder of this article, I will analyze passages from these great works to illustrate the following techniques of good legal writing,<sup>11</sup> beginning with general principles of legal analysis: (1) state a rule, then provide an example; (2) compare, contrast, or analogize your facts to the facts of a decided case; (3) answer the question (*i.e.*, state both the issue and your conclusion up front); (4) prove your conclusions; (5) be concrete, not abstract; (6) provide determinative facts; and (7) consider counterarguments

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<sup>11</sup> These techniques are all described, analyzed, and illustrated in virtually every standard text on legal writing. For two well-known, widely published bibliographies of books and journal articles on legal writing, see George D. Gopen, *The State of Legal Writing: Res Ipsa Loquitur*, 86 MICH. L. REV. 333 (1987); George D. Gopen & Kary D. Smout, *Legal Writing: A Bibliography*, 1



and alternative outcomes. Persuasive writing is amply demonstrated in these works as well. Advocacy principles discussed below include: (8) adopting your client's point of view; (9) maintaining your theory of the case; (10) telling a story, with a theme, sequence, narrator, and plot; (11) arguing in the alternative, when appropriate; (12) using persuasive language; and (13) using the passive voice wisely to make certain points. Finally, because good legal writers must simply be good writers, I will use several passages from the novels to demonstrate: (14) elegant arrangements of words; (15) clear linkage of related ideas; (16) use of active verbs; (17) use of concise language; (18) use of precise language; (19) creative yet proper punctuation; and (20) parallel construction of ideas.

### *1. State a Rule, Provide an Example*

Rule definition is in part what the study of common law is all about. First-year students learn to identify legal rules using as shorthand the names of cases in which particular rules were articulated. What they often neglect is the application, the example of how the rule operates on facts. For instance, when I set a hypothetical negligence problem in New York, I want my class to explain the rule in *Morgan v. State*:<sup>12</sup> people who participate in sports assume risks inherent to the activity. Students

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J. LEGAL WRIT. INST. 93 (1991). For legal writing textbooks cited in this article, see *infra* notes 29, 35, 52, 57, 88, 91, 99, 102, 110.

<sup>12</sup> 685 N.E.2d 202, 207-08 (N.Y. 1997).

understand the idea, but many of them fail in their memorandums to describe by example what “inherent” means. I find this especially maddening because *Morgan*, a consolidation of four cases, is rich in illustrations: a concrete wall at the end of a bobsled run is “inherent.”<sup>13</sup> A student who lands awkwardly after a jump roll in an amateur karate class has taken an “inherent” risk.<sup>14</sup> In contrast, a torn tennis court divider net is not “inherent” to the game.<sup>15</sup>

This excerpt from *Moby Dick* shows how to illustrate a rule using a classic structure that would well suit an inherent risk analysis. The first sentence states the rule; the second amplifies it. The third sentence explains the rule in a general way and the fourth provides the specific example.

[T]o enjoy bodily warmth, some small part of you must be cold, for there is no quality in this world that is not what it is merely by contrast. Nothing exists in itself. If you flatter yourself that you are all over comfortable, and have been so a long time, then you cannot be said to be comfortable any more. But if, like Queequeg and me in the bed, the tip of your nose or the crown of your head be slightly chilled, why then, indeed, in the general consciousness you feel most delightfully and unmistakably warm.<sup>16</sup>

Another technique is to refer to the rule within a list of examples. The rule is almost implicit, while the illustrations

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<sup>13</sup> *Id.* at 209.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 210.

<sup>16</sup> HERMAN MELVILLE, *MOBY DICK* 68 (Signet Classic ed. 1961) (1850).

provide the focus of the analysis. Here, Edith Wharton informs us of acceptable practices among the well-to-do in New York in the 1870s:

[A]n unalterable and unquestioned law of the musical world required that the German text of French operas sung by Swedish artists should be translated into Italian for the clearer understanding of English-speaking audiences. This seemed as natural to Newland Archer as all the other conventions on which his life was moulded: such as the duty of using two silver-backed brushes with his monogram in blue enamel to part his hair, and of never appearing in society without a flower (preferably a gardenia) in his buttonhole.<sup>17</sup>

The rule is that because conventions, no matter how illogical or arbitrary, must be followed, they start to seem perfectly reasonable. The examples are the illogical opera translation and the arbitrary need for one's brushes to be monogrammed and one's buttonhole to be adorned.

Examples are extremely important for rules that, when applied, do something more, or something different, than they suggest. In introductory courses such as "Legal Method," students' eyes are opened to the manipulation of precedent to further social policy.<sup>18</sup> Specific examples can show exactly what

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<sup>17</sup> EDITH WHARTON, *THE AGE OF INNOCENCE* 4-5 (Bantam Classic ed. 1996) (1920).

<sup>18</sup> A favorite line of cases in many torts casebooks chronicles the expansion of the common law of product liability from *Thomas v. Winchester*, 6 N.Y. 397 (1852) (vendor of mislabeled poison is liable to consumer for injury) to *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916) (automobile manufacturer is liable to consumer for injury from defective wheel made by third party). Judge Cardozo stated the rule this way in *MacPherson*: "If the

end the court wanted to achieve, and sometimes how the rule failed in subsequent cases to achieve it. Here is what a mid-nineteenth century English village tried to accomplish — the education of its children — but the rule, the establishment of an evening school, did not effectively reach that goal when applied:

Mr. Wopsle's great-aunt kept an evening school in the village; that is to say, she was a ridiculous old woman of limited means and unlimited infirmity who used to go to sleep from six to seven every evening in the society of youth who paid twopence per week each for the improving opportunity of seeing her do it.<sup>19</sup>

After pondering these fictional excerpts, a student might describe the New York “inherent risk” rule and example like this, by using the latter to explain the former, rather than, as many students tend to do, merely repeating conceptual terms from the *Morgan* opinion like those in the first quoted sentence here:

By “engaging in a sport or recreational activity, a participant consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation,” *Morgan*, 90 N.Y.2d at 486. Like the *Morgan* plaintiff, who had often raced on a bobsled

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nature of a thing is such that it is reasonably certain to place and limb in peril when negligently made, it is then a thing of danger,” *id.* at 1053, which was not significantly differently from Chief Judge Ruggles’ formulation in *Thomas*: “The defendant's negligence put human life in imminent danger. . . . The defendant's duty arose out of the nature of his business and the danger to others incident to its mismanagement,” 6 N.Y. at 410-11. Illustration is imperative: The *Thomas* court said that wagons were not imminently dangerous and thus not subject to the rule, *id.* at 408, yet Cardozo applied his similar rule to a car, which is a vehicle like a wagon.

<sup>19</sup> CHARLES DICKENS, *GREAT EXPECTATIONS* 39 (Bantam Classic ed. 1981) (1861).

run with a concrete wall at its end, all sports participants assume the risk of injury if caused by aspects of the game with which they are familiar; *see id.* at 488.

## 2. *Compare, Distinguish, Analogize*

Closely related to the need to provide examples is the need to show how your client's situation is like or unlike that of a litigant in a prior case. Give the comparable fact and explain what the legally significant similarity or difference is: "[B]its of news soaked like dried beans in spring water – until they were soft enough to digest."<sup>20</sup> "[H]e is as bad as the wrong physic – nasty to take, and sure to disagree."<sup>21</sup> "Of his two carriage companions one was a youth, fresh to the East like himself, the other a seasoned Anglo-Indian of his own age. A gulf divided him from either; he had seen too many cities and men to be the first or to become the second."<sup>22</sup>

The comparisons or differences drawn must be meaningful. Students sometimes focus on narrow, technical distinctions: If case A involves a red hat and case B a blue one, chances are the analysis will be the same for both, despite the distinguishing colors. Some people, however, invariably conclude that the outcome for case B cannot be predicted based on case A. A student, in explaining the "inherent risk" doctrine mentioned

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<sup>20</sup> TONI MORRISON, *BELOVED* 65 (Plume ed. 1988) (1987).

<sup>21</sup> ELIOT, *supra* note 3, at 81.

<sup>22</sup> E.M. FORSTER, *A PASSAGE TO INDIA* 61 (Harvest/HBJ ed. 1952) (1924).

above, saw the torn tennis net in *Morgan*<sup>23</sup> exclusively as a piece of damaged sports equipment rather than as one of many parts of the playing field, paraphernalia, rules, and conditions of a sport. For the court, what separated the torn net from other aspects of the game was that tennis players do not expect a divider net to get in their way. When the student compared the torn net to sound cables that were awkwardly placed in the way of performers on a stage, he therefore distinguished them when he should have seen them as similar:

The plaintiff asserted that the torn net was not inherent in the sport and therefore a player should not be deemed as assuming the risk of injury. The risk was created by the defendants from the faulty tool used in the sport, which is what ultimately made them liable. Our case does not seem to suggest this. The sound cables were not faulty and they were not used as a tool in the performance.

I encouraged this student to look at what the judge cared about in writing the opinion. What characteristics of the facts at issue led the judge to reach the holding? In the stage performance hypothetical, the student should have realized that just like the tennis court divider net, the sound cables were not supposed to get in the participants' way. Though technically distinguishable from the torn net because they were not faulty, the sound cables were similar in a legally significant way, a way that made their interference a surprise. Like the torn divider net, they were not inherent to the activity.

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<sup>23</sup> See discussion *supra* Part II.B.1.

Students can learn to focus on what matters from the following excerpts. In *Wuthering Heights*, Cathy articulates the significant characteristics of two kinds of feelings as she compares them to aspects of the environment: “My love for Linton is like the foliage in the woods: time will change it, I’m well aware, as winter changes the trees. My love for Heathcliff resembles the eternal rocks beneath: a source of little visible delight, but necessary.”<sup>24</sup> In *A Farewell to Arms*, Lieutenant Henry describes other attributes of romance with this analogy: “I did not love Catherine Barkley nor had any idea of loving her. This was a game, like bridge, in which you said things instead of playing cards. Like bridge you had to pretend you were playing for money or playing for some stakes.”<sup>25</sup> What does *not* matter is whether the character is a woman or a man, or whether the speaker is romantic or cynical. What matters is that Bronte sees relationships emotionally while Hemingway sees them intellectually. For Cathy, feelings are beyond our powers to alter, like falling leaves in winter and rocks that form foundations. For Henry, feelings can be manipulated according to a strategy, as in bridge.

Sometimes the pertinent comparison is the obvious one, as when Wharton describes physical differences between the protagonists in *The Age of Innocence* and two actors in a play: “Newland Archer could not pretend to anything approaching the young English actor’s romantic good looks, and [the actress] was a

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<sup>24</sup> EMILY BRONTE, *WUTHERING HEIGHTS* 74 (Bantam Classic ed. 1981) (1847).

<sup>25</sup> ERNEST HEMINGWAY, *A FAREWELL TO ARMS* 30-31 (Scribner Paperback ed. 1995) (1929).

tall red-haired woman of monumental build whose pale and pleasantly ugly face was utterly unlike Ellen Olenska's vivid countenance."<sup>26</sup> Yet a scene of the play reminds Archer of Olenska, and he ponders why. Just as in legal analysis, subtleties can change one's conclusion. Things that at first glance seem different may upon closer examination suggest the same treatment: "Wherein, then, lay the resemblance that made the young man's heart beat with a kind of retrospective excitement? It seemed to be in Madame Olenska's mysterious faculty of suggesting tragic and moving possibilities outside the daily run of experience."<sup>27</sup> Whether the subtle similarity trumps the obvious difference, or vice versa, depends on what the judge cared about in writing the opinion.

An illustration that describes not just characteristics but consequences, and is thus even more pertinent to making legal analogies, is Scobie's thought as he speaks to Helen in *The Heart of the Matter*: "He went slowly and cautiously on, choosing his words carefully, as though he were pursuing a path through an evacuated country sown with booby-traps: every step he took he expected the explosion."<sup>28</sup> As a voluntary participant, Scobie assumes the risks inherent to his activity. He knows and appreciates the dangers of walking through a minefield and so cannot hold anyone else liable if he stumbles and is injured. He is

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<sup>26</sup> WHARTON, *supra* note 17, at 102.

<sup>27</sup> WHARTON, *supra* note 17, at 102.

<sup>28</sup> GRAHAM GREENE, *THE HEART OF THE MATTER* 158 (Penguin Great Books of the 20th Century ed. 1999) (1948).



like the karate student who falls on landing from a jump roll, not like the tennis player who trips on a torn net.

### 3. *Answer the Question*

Another writing imperative is that one should reveal one's conclusion sooner rather than later. Never leave your supervising attorney<sup>29</sup> in suspense about the likely outcome. Will we win or lose on this issue? A writer should give the answer as soon as he or she has explained the question. The latter might involve some discussion of rules and applications, which is fine as long as the supervising attorney gets the snapshot without having to read the caption. This snapshot is clear: "What is friendship without confidences? He himself had told things sometimes regarded as shocking, and the Englishman had listened, tolerant, but surrendering nothing in return."<sup>30</sup> The snapshot gives a full picture, though implied rather than explicit: true friendship cannot exist without confidences.

After such an introduction to the issue, analyses can proceed in more depth. This next excerpt answers the specific, fact-based question as it asks it, and includes a more general issue/conclusion in the follow-up sentence: "If you've got a good job, about fifteen grand a year, and health insurance, and a

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<sup>29</sup> The "supervising attorney" or "supervising partner" is the paradigmatic reader of a Legal Writing student's office memorandum; a person pressed for time who needs the memorandum's analysis to advise the client. *See, e.g.*, RICHARD K. NEUMANN, JR., *LEGAL REASONING AND LEGAL WRITING: STRUCTURE, STRATEGY, AND STYLE* 67-68 (4th ed. 2001).

<sup>30</sup> FORSTER, *supra* note 22, at 271-72.

retirement fund, and maybe some stock as well, why shouldn't you be a radical too? Literate people appropriate all the best things they can find in books, and dress themselves in them . . . ."<sup>31</sup>

More complex questions may require longer explanations or applications before answers can be adequately revealed. F. Scott Fitzgerald's snapshot takes longer to develop because the idea is subtle: Nicole, a relatively well-to-do "shop-girl," unconsciously "pulls herself back a little" from Kaethe, whose working class status is revealed by her body rather than by her appearance or manner:

Kaethe had touched a material truth. She did most of her work herself, and, frugal, she bought few clothes. An American shopgirl, laundering two changes of underwear every night, would have noticed a hint of yesterday's reawakened sweat about Kaethe's person, less a smell than an ammoniacal reminder of the eternity of toil and decay.<sup>32</sup>

By the end of the third, long sentence, the reader understands that Nicole is not consciously a snob, but is repulsed by the thought that some must labor to survive. The question is why Nicole "pulls back" and the answer is "because of the eternity of toil and decay."

If the application is fully provided before the conclusion, the reader may not appreciate the latter. Case facts may be

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<sup>31</sup> SAUL BELLOW, *HERZOG* 217 (Penguin ed. 1996) (1961).

<sup>32</sup> F. SCOTT FITZGERALD, *TENDER IS THE NIGHT* 240 (Scribner paperback ed. 1995) (1934).

complex and relating the whole story takes time. The reader is now well versed in exactly what happened, which is generally a good thing,<sup>33</sup> but has lost sight of the full picture, which includes wide concepts as well as the narrow outcome. For example, consider how much less effective this passage from *Pride and Prejudice* would be if the first sentence followed rather than preceded the rest of the description:

Mr. Bennet had very often wished before this period of his life that instead of spending his whole income, he had laid by an annual sum for the better provision of his children, and of his wife, if she survived him. . . . When first Mr. Bennet had married, economy was held to be perfectly useless; for, of course, they were to have a son. This son was to join in cutting off the entail, as soon as he should be of age, and the widow and younger children would by that means be provided for. Five daughters successively entered the world, but yet the son was to come; and Mrs. Bennet, for many years after Lydia's birth, had been certain that he would. This event had at last been despaired of, but it was then too late to be saving.<sup>34</sup>

#### 4. *Prove Your Conclusions*

Every lawyer remembers learning some version of “IRAC” in law school: issue, rule, application, conclusion. The basic building block of legal analysis, taught in legal writing and legal method courses, includes a statement of the legal question that

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<sup>33</sup> See discussion *infra* Part II.B.18.

<sup>34</sup> JANE AUSTEN, *PRIDE AND PREJUDICE* 221 (Modern Library ed. 1995) (1813).

must be answered, a statement of the governing rule of law, an application of that rule to facts, and a conclusion, or answer to the question, usually in the form of a prediction of how a court would decide the issue.<sup>35</sup> It is, of course, based on the writing techniques described above. Every lawyer also knows that a legal proof need not, indeed, usually does not, take the IRAC structure in its literal form. As just discussed, the conclusion is usually best explained first. The issue may be inferred from the analysis rather than presented explicitly, or the rule may be inferred from the applications. All four elements need to be included in some form, however, and beginning legal writers experience enormous difficulty with them. The most common student error is to include only the rule and conclusion: application of the student's common sense suggests that the answer is obvious, so why take up space explaining how the rule applied in a prior, similar case?<sup>36</sup>

For example, when predicting whether a court would find a salesperson in a hypothetical to be an employee or an independent contractor, most of my students quickly concluded that he was an employee under a so-called "hybrid" test, used by many federal courts to interpret the definition of employment for purposes of the

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<sup>35</sup> See, e.g., CHARLES R. CALLEROS, *LEGAL METHOD AND WRITING* 69-95 (4th ed. 2002); CATHY GLASER ET AL., *THE LAWYER'S CRAFT: AN INTRODUCTION TO LEGAL ANALYSIS, WRITING, RESEARCH, AND ADVOCACY* 115-43 (2002); NEUMANN, *supra* note 29, at 95-118.

<sup>36</sup> Taking up space is an important consideration for legal writing students, as most professors impose strict page limits. Since few writers are concise, their wordy explanations of their own conclusions fill paragraphs that might otherwise have proved those conclusions. See discussion *infra* Part II.B.17.

Civil Rights Act of 1964.<sup>37</sup> One student wrote:

Under the hybrid test, the Court examined the realities of the relationship and considered the extent of the employer's control over the means and the matter of the employee's duties and performance. [Our salesman] is an employee under the hybrid test. He was required to work under the direct supervision of another salesperson for training purposes and the work he performed was integral to the employer's business.

At least this student referred to our client's facts; some handed in papers that explained the rule in great depth, then stopped at the conclusion "the salesman is an employee under the hybrid test." But the student above did not prove why training supervision met the hybrid test, and did not apply the rule to any facts when he characterized the salesperson's work as "integral" to the employer's business. Better papers might follow the logic presented below, which shows how a multi-factor test should be applied in like instances. The issue in this excerpt from *Sister Carrie* is clear from the statement of the conclusion, and the rule is easily extracted from the examples. The issue: whether Mrs. Hurstwood should purchase a season ticket to the races. The rule: a purchase is worthwhile if a three-part test is met: the neighbors have done so, you have a tip on a horse, and your daughter is ready to attract suitors. The applications to fact lead to a definitive conclusion:

Mrs. Hurstwood had never asked for a whole season

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<sup>37</sup> 42 U.S.C. § 2000e (2000); see, e.g., *Hatcher v. Augustus*, 956 F. Supp. 387, 390 (E.D.N.Y. 1997).

ticket before, but this year certain considerations decided her to get a box. For one thing, one of her neighbors, a certain Mr. and Mrs. Ramsey, who were possessors of money made out of the coal business, had done so. In the next place, her favorite physician, Dr. Beale, a gentleman inclined to horses and betting, had talked with her slightly concerning his intention to enter a two-year-old in the Derby. In the third place, she wished to exhibit Jessica, who was rapidly gaining in maturity and beauty, and whom she hoped to marry to a man of means.<sup>38</sup>

The hybrid test for employment status could be applied, and the conclusion proved that our salesman was an employee, in much the same way. The main case used by my students included facts that showed exactly what manner of supervision and how “integral” to the employer’s business a worker’s duties needed to be to meet the test: Our salesman’s responsibilities were integral because, first, like the plaintiff in *Hatcher*, he also . . . . Next, as in *Hatcher*, he was supervised by another salesperson in the following ways . . . .<sup>39</sup>

A more playful example, using analogies within analogies, proves the adage that flattery gets one ahead. The question is how much money need be spent to insure a good result; the rule is that if the person making the effort is talented enough, very little will do. The application to an analogous fact pattern shows that a skilled chef can make a tasty dish with few ingredients. The

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<sup>38</sup> THEODORE DREISER, *SISTER CARRIE* 140 (Penguin Books ed. 1981) (1900).

<sup>39</sup> See *Hatcher*, 956 F. Supp. at 391-92.

conclusion that a skilled flatterer gains loyalty without bestowing material gifts is proved because the application of the rule to our facts is just like its application to the cook:

Who was the blundering idiot who said that “fine words butter no parsnips”? Half the parsnips of society are served and rendered palatable with no other sauce. As the immortal Alexis Soyer can make more delicious soup for a half-penny than an ignorant cook can concoct with pounds of vegetables and meat, so a skilful artist will make a few simple and pleasing phrases go farther than ever so much substantial benefit-stock in the hands of a mere bungler. . . . Mrs. Bute had told Briggs and Firkin so often of the depth of her affection for them . . . that the ladies in question . . . felt as much gratitude and confidence as if Mrs. Bute had loaded them with the most expensive favours.<sup>40</sup>

Another valuable proof involves showing that the rule must apply to one’s client in the opposite way to that in a prior case because the facts are so different. From *Vanity Fair*, the same novel quoted directly above, the conclusion proved below is that necessity changes an ordinarily law-abiding citizen into a thief. The rule is that dishonesty is in people’s nature, and only circumstances determine whether they behave well:

A comfortable career of prosperity, if it does not make people honest, at least keeps them so. An alderman coming from a turtle feast will not step out of his carriage to steal a leg of mutton; but put

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<sup>40</sup> WILLIAM THACKERAY, *VANITY FAIR* 222-23 (Bantam Classic ed. 1997) (1848).

him to starve, and see if he will not purloin a loaf.<sup>41</sup>

In legal writing, as in life, we need to compare or distinguish the facts of prior situations to predict the outcome of our own.

### 5. *Be Concrete, Not Abstract*

The study of law is full of abstractions but the practice of law is concrete. Lawyers represent clients with real-life problems that must be solved. A contract is drafted for the purchase of actual goods for a set price, and either party's liability for failing to satisfy its obligation consists of damages calculated to compensate for particular losses. Clients do not want to know what the principles are so much as they want to know what damages are awarded to similarly situated parties, if such parties usually win their lawsuits.

Law students who have not yet represented clients neglect to examine who won or lost and instead zoom in on principles. Speaking in abstractions is a near-universal law student habit that must be broken. I have read countless passages that caused me to think more or less like Ralph Touchett in *The Portrait of a Lady*, who tries to understand his mother's telegram. Describing how she has just taken her orphaned niece traveling, she writes: "Taken sister's girl, died last year, go to Europe, two sisters, quite

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<sup>41</sup> *Id.* at 536. Note the semicolon in the second sentence, which today's grammarians would replace with a comma.



independent.”<sup>42</sup> The ambiguity created by the cryptic telegram is just like that of the student who explains duty in a negligence analysis as “the landowner’s responsibility to make the premises safe.” In James’ novel, Ralph muses:

Over that my father and I have scarcely stopped puzzling; it seems to admit of so many interpretations. . . . [W]ho’s “quite independent”, [sic] and in what sense is the term used? — that point’s not yet settled. Does the expression apply more particularly to the young lady my mother has adopted, or does it characterize her sisters equally? — and is it used in a moral or in a financial sense? Does it mean that they’ve been left well off, or that they wish to be under no obligation? or does it simply mean that they’re fond of their own way?<sup>43</sup>

The passage also illustrates the importance of grammar to meaning, not only in legal writing, but also in drafting and statutory interpretation.<sup>44</sup> Mrs. Touchett’s telegram suffers from

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<sup>42</sup> HENRY JAMES, *THE PORTRAIT OF A LADY* 67 (Penguin Classics ed. 1986) (1881).

<sup>43</sup> *Id.*

<sup>44</sup> First-year students tend not to accept an inherent problem of language, that all words are subject to interpretation, nor do they appreciate changes of meaning caused by alterations in sentence structure or punctuation. Courts, on the other hand, very much in the business of figuring out what words mean, often struggle with identifying which definition was intended or whether the grammar of a statutory sentence accurately reflects what the legislature wanted to accomplish. For example, the District Court in *Ryan v. CARL Corp.*, 23 F. Supp. 2d 1146, 1149 (N.D. Cal. 1998), spent some time analyzing a sentence in the copyright law:

Unless the parties have contracted otherwise, “the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work

lack of clarity in two ways: which definition of a word is intended, and to which individuals it applies. For the student who writes of safe premises without further amplification, I wonder in what sense she is using the term. To whom does this safety apply, a particular class of plaintiffs, or all, equally, who enter the premises? Is “safe” an absolute assessment, in the nature of a guarantee, or is it relative, dependent upon which dangers are reasonably foreseeable (and if the latter, what exactly does that mean?).

Perhaps even more to the point is this passage from *Jude the Obscure*, which describes a child who thinks in fact categories rather than facts, just like many of my students:

Children begin with detail, and learn up to the general; they begin with the contiguous, and gradually comprehend the universal. The boy seemed to have begun with the generals of life, and never to have concerned himself with the particulars. To him the houses, the willows, the obscure fields beyond, were apparently regarded

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in the same series.” 17 U.S.C. § 201(c). The dispute in this case turns on the meaning of the words “as part.”

There are two possible ways to parse this sentence grammatically. Defendants suggest that it be parsed so that “as part” is included only in the first clause of the sentence: “. . . reproducing and distributing (1) the contribution as part of that particular work; (2) any revision of that collective work; and (3) any later collective work in the same series.” The Court adopts the more natural parsing, in which “as part” serves as part of each of the three clauses: “. . . reproducing and distributing the contribution as part of (1) that particular work; (2) any revision of that collective work; and (3) any later collective work in the same series.”

*Id.* at 1149 n.2.

not as brick residences, pollards, meadows; but as human dwellings in the abstract, vegetation, and the wide dark world.<sup>45</sup>

To be sure, fact categories are essential to identify in the course of legal analysis. Without extrapolation from fact to fact category, we would not be able to fashion any rules or draw any analogies. But many students jump to their conclusions without acknowledging the particulars from which they have induced the general law. This student, when describing what happened in *Bourne v. Walt Disney Co.*,<sup>46</sup> said, “the plaintiff was the assignee of certain copyrighted musical compositions, which the defendant had a license to use in certain mediums. The plaintiff sued, as he believed that the defendant’s use of the compositions in a particular medium was infringing his rights.” Which mediums were at issue here? Which did the contract specify? What was the additional “particular medium” in which the defendant used the compositions, a use which caused the plaintiff to sue? And who won the case? The same two sentences could say, instead, “Defendant, the Walt Disney Company, obtained a license in the 1930s to use several copyrighted musical compositions in two of its animated films, and assigned all other rights in the compositions to plaintiff. Plaintiff sued when Disney distributed the films on videocassette decades later, arguing, unsuccessfully, that the license did not include the new medium.”

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<sup>45</sup> THOMAS HARDY, *JUDE THE OBSCURE* 291 (Bantam Classic ed. 1996) (1896).

<sup>46</sup> 68 F.3d 621 (2d Cir. 1995).

Abstractions are, of course, even more rampant in explanations of rules than of facts, as rules by their very nature are general. An abstract statement of a rule is appropriate, provided the writer then provides either a specific example of its application or a concrete description of how the rule tends to operate in the real world. In the next student paper excerpt, the more one thinks about the abstract negligence principles discussed, the less they mean. Eager to articulate every doctrine identified in the case (and no doubt discussed at length several weeks earlier in Torts class), this student, like so many, provided lots of labels but failed to attach them to the concrete aspects of the lawsuit. The explanation of ideas is fine, but unaccompanied by anything more the ideas are too vague:

In *Turcotte v. Fell*, 68 N.Y.2d 432 (1986), a professional jockey injured in a fall during a horse race sued the owner for failure to maintain the condition of the track. The court defined the concept of primary assumption of risk. The defendant's duty is to make the conditions as safe as they appear to be. If the risk of the activity is fully comprehended by the plaintiff and he assented to it, then the defendant has performed his duty. The court in *Turcotte* viewed assumption of risk as not a measure of plaintiff's comparative fault "but a measure of the defendant's duty of care." *Id.* at 439.

The student never gave either illustrations or meaningful descriptions of the ideas of assumption of risk, comparative fault, or duty of care: what exactly were the track conditions and how did they appear? The passage suggests that professional jockeys

assume risks as long as they understand the dangers. Does this mean that track owners are not liable even if they flood a part of the track in order to trip the jockey, so long as the jockey sees the water?<sup>47</sup> To describe “assumption of risk” with the equally abstract measures of “fault” or “duty” does not help the reader understand when the track owner is liable and when not. And did the track owner win or lose in this case, anyway?

Here are some examples from which both of the students criticized above might learn. In *Middlemarch*, Mr. Bulstrode, the chairman of a hospital board of directors, refers to another board member as “useful.” Eliot provides a concrete definition: “A useful member was perhaps to be defined as one who would originate nothing, and always vote with Mr. Bulstrode.”<sup>48</sup> Eliot also puts words of wisdom in the mouths of some of her less admirable, but notably practical, characters. Plainspoken Mrs. Cadwallader, frustrated with her friend Mr. Brooke’s quixotic attempt to get involved in politics, says, “If I knew the items of election expenses I could scare him. It’s no use plying him with wide words like Expenditure: I wouldn’t talk of phlebotomy, I would empty a pot of leeches upon him.”<sup>49</sup> Mr. Brooke, like all clients — and like all supervising attorneys — needs to know the concrete results of a course of action, not the jargon used to name the operative principle. In *Invisible Man*, Ralph Ellison describes a

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<sup>47</sup> Such intentional conduct is *not* covered by the *Turcotte* assumption of risk rule, and the track owner would be liable. See 502 N.E.2d 964, 968-69 (N.Y. 1986).

<sup>48</sup> ELIOT, *supra* note 3, at 413.

<sup>49</sup> ELIOT, *supra* note 3, at 413.

group of people who look like they are participating in a ritual. He includes concrete descriptions so that the reader can visualize the abstract characterization of them moving “like dancers” at a “funeral.” Though obviously more lyrical and presented more subjectively than a description of case facts in a memorandum, these words illustrate the importance of telling the reader what the situation looked like, which is exactly what is lacking in the student excerpts above, which fail to situate the dispute (or its resolution) in concrete terms:

I stared as they seemed to move like dancers in some kind of funeral ceremony, swaying, going forward, their black faces secret, moving slowly down the subway platform, the heavy heel-plated shoes making a rhythmical tapping as they moved. Everyone must have seen them or heard their muted laughter, or smelled the heavy pomade on their hair . . . .<sup>50</sup>

### 6. *Provide Determinative Facts*

Because students focus on rules rather than applications, they may fail when they write about a case to describe the facts to which the judge applied the rule. The concept of facts that “determine” the outcome is not readily understandable to beginning students, so I again encourage them simply to think about what the judge cared about.<sup>51</sup> What aspects of the controversy were important to the judge’s reasoning? Include everything that relates directly to the holding and nothing more,

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<sup>50</sup> RALPH ELLISON, *INVISIBLE MAN* 440 (Vintage Int’l ed. 1995) (1952).

<sup>51</sup> See also *supra* Part II.B.2-3.

unless needed to make the story understandable. Legal writing textbooks provide excellent definitions and examples,<sup>52</sup> yet striking the right balance between being specific (a “hat,” not “headwear”) and not giving unnecessary detail (a “hat, not a “blue hat”) is difficult.

That balance is suggested in the following passages, all of which provide information that the reader understands will be important to the outcome of some aspect of the plot, yet contain few, if any, extraneous notes. The first is from Theodore Dreiser’s *Sister Carrie*:

When Caroline Meeber boarded the afternoon train for Chicago her total outfit consisted of a small trunk, which was checked in the baggage car, a cheap imitation alligator skin satchel holding some minor details of the toilet, a small lunch in a paper box and a yellow leather snap purse, containing her ticket, a scrap of paper with her sister’s address in Van Buren Street, and four dollars in money. It was August, 1889.<sup>53</sup>

A lot of facts are packed into the first sentence above. As the novel unfolds, we learn the significance of the afternoon train for Chicago; why the catalog of what Caroline Meeber was

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<sup>52</sup> See, e.g., LAUREL CURRIE OATES ET AL., THE LEGAL WRITING HANDBOOK: ANALYSIS, RESEARCH, AND WRITING 84 (3d ed. 2002) (“A legally significant fact is a fact that a court would consider in deciding whether a statute or rule is applicable or in applying that statute or rule.”); GLASER ET AL., *supra* note 35, at 43 (“The **supporting facts** are not necessary to the outcome of the case, but assist the reader in understanding what happened. The **procedural facts** describe how the parties got to court. . . . The **necessary facts** are those the court relied on to reach its decision.”).

<sup>53</sup> DREISER, *supra* note 38, at 3.

holding, and in what containers, matter; and how not one but several outcomes depend on the scrap of paper with a sister's address in Van Buren Street.

This one, from Ford Madox Ford's *The Good Soldier*, is legalistic in its attention to dates, which, even if not determinative — though they frequently are — are important to help the reader understand the relationship of events.<sup>54</sup>

On the 1st of September they returned from Nauheim. Leonora at once took to her bed. By the 1st of October they were all going to meet together. Nancy had already observed very fully that Edward was strange in his manner. About the 6th of that month Edward gave the horse to young Selmes, and Nancy had cause to believe that her aunt [Leonora] did not love her uncle [Edward]. On the 20th she read the account of the divorce case, which is reported in the papers of the 18th and the two following days. On the 23rd she had the conversation with her aunt in the hall — about marriage in general and about her own possible marriage. Her aunt's coming to her bedroom did not occur until the 12th of November. . . . Thus she had three weeks for introspection.<sup>55</sup>

Finally, descriptions of who the parties are should be tailored to what is legally significant about them in the current dispute. In the realm of *Vanity Fair*, where one's pedigree matters, the following is one of many family histories crucial to the

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<sup>54</sup> See OATES ET AL., *supra* note 52, at 86 (explaining that dates may provide background, which “helps tell the story”); see also GLASER ET AL., *supra* note 35, at 43 (quoted *supra* note 52).

<sup>55</sup> FORD MADOX FORD, *THE GOOD SOLDIER* 222 (Vintage ed. 1955) (1915).



character's position in society and to events that will later depend on his or her ancestry:

Sir Pitt Crawley (named after the great Commoner) was the son of Walpole Crawley, first Baronet, of the Tape and Sealing-Wax Office in the reign of George II, when he was impeached for peculation, as were a great number of other honest gentlemen of those days; and Walpole Crawley was, as need scarcely be said, son of John Churchill Crawley, named after the celebrated military commander of the reign of Queen Anne.<sup>56</sup>

### 7. *Consider Alternative Outcomes*

"A counterargument is a plausible reason for arriving at a different conclusion."<sup>57</sup> I think of counterarguments as "alternative outcomes." That helps combat the following favorite student memorandum phrases: "it can be argued that," "we can argue that," and "defendant (or plaintiff, whichever is the adversary party) can argue that." Although there is nothing wrong with the occasional use of "we can argue/they can argue," novice legal writers too often begin every paragraph in the Discussion section of a memorandum with such words, interpreting the concept of "counterargument" too literally. Instead of thinking of what each side will argue, element by element, legal writers should think of the more likely and less likely disposition of each element. The purpose of a memorandum, after all, is to predict how our court will decide our client's case. In addition, simply as a matter of

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<sup>56</sup> THACKERAY, *supra* note 40, at 75.

<sup>57</sup> JOHN C. DERNBACH ET AL., A PRACTICAL GUIDE TO LEGAL WRITING AND LEGAL METHOD 158 (2d ed. 1994).

writing style, alternative interpretations can be presented in a variety of elegant ways. Here are some examples.

If the alternatives are about equally weighted, a writer can present them together. In *Wuthering Heights*, Hareton does not know when to expect Hindley's love and when his anger, but he fears both in equal measure:

Hareton was impressed with a wholesome terror of encountering either [Hindley's] wild-beast's fondness or his madman's rage; for in one he ran a chance of being squeezed and kissed to death, and in the other of being flung into the fire, or dashed against the wall . . . .<sup>58</sup>

Another technique is to present such alternatives as hypotheticals: if condition A exists, outcome A follows, but if condition not-A exists, then outcome not-A follows. This is the approach Nathaniel Hawthorne took to characterize the options faced by a woman like Hester Prynne, who has suffered an ordeal. Note that he starts with the answer to the question, then explains the conditions and consequences:

Some attribute had departed from her . . . . Such is frequently the fate . . . when the woman has encountered, and lived through, an experience of peculiar severity. If she be all tenderness, she will die. If she survive, the tenderness will either be crushed out of her, or — and the outward semblance is the same — crushed so deeply into her heart that

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<sup>58</sup> BRONTE, *supra* note 24, at 66.

it can never show itself more.<sup>59</sup>

If there are several possible outcomes, words like “maybe” and “perhaps” can be useful, as in this description of an academic researcher:

Winnie was well-known on the Hill for moving from place to place without being seen. No one knew how she managed this or why she found it necessary. Maybe she was self-conscious about her awkward frame, her craning look and odd lope. Maybe she had a phobia concerning open spaces, although the spaces at the college were mainly snug and quaint. Perhaps the world of people and things had such an impact on her, struck her with the force of some rough and naked body . . . that she found it easier to avoid frequent contact. Maybe she was tired of being called brilliant.<sup>60</sup>

Another technique is first to describe the outcome one favors even if less likely, which serves the purpose of explaining what “we will argue.” Then one proceeds to describe the alternative, conceding that it is the stronger argument. Caspar Goodwood, in *The Portrait of a Lady*, considers whether he can take the night train when he is traveling to the same destination at the same time as Miss Stackpole. The answer is clearly no, but he analyzes the favorable outcome first, before acknowledging that the unfavorable outcome is the winner:

[H]e would have liked to go alone, in the night-train. He hated the European railway-carriages, in

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<sup>59</sup> NATHANIEL HAWTHORNE, *THE SCARLET LETTER* 150 (Bantam Classic ed. 1986) (1850).

<sup>60</sup> DON DELILLO, *WHITE NOISE* 184-85 (Penguin Books ed. 1986) (1985).

which one sat for hours in a vise, knee to knee and nose to nose with a foreigner to whom one presently found one's self objecting with all the added vehemence of one's wish to have the window open . . . . But he couldn't take a night train when Miss Stackpole was starting in the morning . . . . [S]he was a lady travelling alone; it was his duty to put himself out for her.<sup>61</sup>

The lesson learned from all these examples is not in the language used so much as in the notion that alternative outcomes can and should be described with subtlety. Most legal arguments can be supported with more than one line of reasoning, and many can be countered. All permutations should be considered and the strongest ones should be included in the analysis, approached in similar ways to the fictional passages above.

Another challenge to writing a counterargument is keeping straight which outcome is more likely and which less. The "we can argue/they can argue" dichotomy can be a useful tool for staying on track, provided the writer has already stated clearly which party will probably win. Such dichotomies are often acted out in fiction, as in court, with dialogue. Although obviously not a technique that writers can use in legal memoranda, dialogue, as in these last two illustrations, shows the importance of weighting the alternatives. Because the reader is already familiar with the characters in the next two excerpts, he or she knows that the person who states the second opinion is the one who is right. Both of these also illustrate that sometimes the question is not how the

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<sup>61</sup> JAMES, *supra* note 42, at 509.

rule will be applied, but rather which rule should apply.

After explaining an obscure historical fact to his brother, Herzog, in Bellow's novel of the same name, and Will, the brother, have the following interchange: " 'How nice to have an education,' said Will. 'To be pedantic, you mean,' said Herzog.' ”<sup>62</sup> Which rule applies, that a store of obscure information is something to be admired or that it is something to be scorned? Arguably the former, but more likely the latter.

In *Pride and Prejudice*, Elizabeth and Darcy argue about whether Hertfordshire, fifty miles from where all parties are currently situated, is near or far. Elizabeth takes the position that for Mrs. Collins, a woman of modest means, the distance of fifty miles is great, while Darcy posits that such a distance only seems great when women, specifically Mrs. Collins and Elizabeth herself, have loved ones at the other end. Which rule should apply, that the length of a journey be measured by the eagerness of the passenger to arrive, or by the passenger's financial resources? Mrs. Collins, like Elizabeth, was born and raised in Hertfordshire, where her friends and family remain, but she has recently married and relocated. Elizabeth's parents and sisters live at Longbourn. Darcy says,

“And what is fifty miles of good road? Little more than half a day's journey. Yes, I call it a very easy distance. . . . It is proof of your own attachment to Hertfordshire. Anything beyond the very neighborhood of Longbourn, I suppose, would

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<sup>62</sup> BELLOW, *supra* note 31, at 330.

appear far.”<sup>63</sup>

Elizabeth replies,

“I should never have said Mrs. Collins was settled *near* her family. . . . The far and the near must be relative, and depend on many varying circumstances. Where there is fortune to make the expenses of travelling unimportant, distance becomes no evil. But that is not the case *here*. Mr. and Mrs. Collins have a comfortable income, but not such a one as will allow of frequent journeys – and I am persuaded my friend would not call herself *near* her family unless less than *half* the present distance.”<sup>64</sup>

### 8. *Present Your Client’s Point of View*

Point of view is a good topic for segueing from objective to persuasive writing. Point of view is not often addressed in the composition of legal memoranda, but in the hands of a good writer, a memorandum with a point of view is much more useful to the reader, our supervising attorney who wants a strategy for winning the case or advising the client, than one without. Beginning memorandum writers should strive for objectivity, though, in the interest of accurately predicting how a court will see our client’s matter. “Point of view” in a memorandum can translate into overuse of “we can argue/they can argue” when encouraged in a first-year student. But encourage it we must when that student turns to advocacy, where basic principles of

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<sup>63</sup> AUSTEN, *supra* note 34, at 130-31.

<sup>64</sup> AUSTEN, *supra* note 34, at 130-31.

persuasion must be added to analysis.

“Point of view” refers, simply, to who is telling the story.<sup>65</sup> The narrator is an individual whose voice consistently projects what one mind – at least in legal writing, a single mind – thinks of the events that have occurred.<sup>66</sup> The legal writer, representing a hypothetical client and writing the most common first-year legal writing advocacy document, an appellate brief, must present the statement of the case and the argument from the client’s perspective. The narration must be from a non-participant whose “selective omniscience”<sup>67</sup> tells the story as recorded in the mind of one character,<sup>68</sup> the client. The reader must empathize after being encouraged by the narrator to “share the experiences”<sup>69</sup> of the protagonist.

The secret to conveying a point of view is to describe what your client sees rather than simply to add a lot of adjectives and adverbs. One year, I assigned an appellate brief problem involving a dispute between an artist and a museum. The artist’s sculpture was damaged in transit from its location in the museum lobby to an outdoor garden. The artist asserted, among other claims, that her contract with the museum guaranteed that the piece would remain

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<sup>65</sup> SYLVAN BARNET ET AL., AN INTRODUCTION TO LITERATURE 37 (2d ed. 1963); accord P. ALBERT DUHAMEL & RICHARD E. HUGHES, LITERATURE FORM AND FUNCTION 450 (1965).

<sup>66</sup> See CLEANTH BROOKS ET AL., AN APPROACH TO LITERATURE 866 (5th ed. 1975).

<sup>67</sup> BARNET ET AL., *supra* note 65, at 38, 39.

<sup>68</sup> BARNET ET AL., *supra* note 65, at 38, 39; see also BROOKS ET AL., *supra* note 66, at 13-15.

<sup>69</sup> See Randy Lee, *Writing the Statement of the Case: the “Bear” Necessities*, 10 WHITTIER L. REV. 619, 624 (1989).

in the lobby. Several student briefs tried to characterize the parties and their actions in the statement of the case section, but failed to describe various experiences from a consistent point of view. Sometimes, had I not known from the cover pages which briefs were for the appellant and which for respondent, I would not have been able to figure out who was telling the story.

In one brief, for example, the artist became “distraught,” the museum chairman got “angry,” and the movers “unfortunately defaced” the sculpture. In another, the decision to change the work’s location was due in part to the museum’s “change in leadership,” the artist “felt the relocation was not a proper venue,” and the moving company was “well known and respected.” If you guessed that the first student represented the artist and the second represented the museum, you guessed correctly. But if you were the artist’s attorney, you would not use the word “unfortunately,” which suggests an accident, if you were making a fault-based claim for the artwork’s defacement, would you? If you were the museum’s attorney, you would not call attention to the “change in leadership” on the board of directors if you wanted to show that the contract was being interpreted consistently by the museum over time, would you? These students would have been much more effective had they quoted the contract language, the email exchanges between the artist and museum director, the credentials of the moving company, and the precise description in testimony of the damage to the work, all of which was in the Record on Appeal. In addition to providing specific information rather than



vague characterizations, these students should have focused their attention on their clients' perceptions. Their stories should have shown rather than told the reader that the artist thought the museum's decision was both a violation of the contract and dangerous to the sculpture, or that the museum thought its decision was appropriate both aesthetically and contractually.

See how effective this sentence is at conveying the viewer's negative feelings toward a college town: "In a street called Thayer Street, in the residential green, fawn, and golden of a mellow academic townlet, one was bound to have a few amiable fine-dayers yelping at you."<sup>70</sup> The viewer in the following clearly does not like the person he is describing: "Shapiro, in his stylish pin-striped suit, pointed shoes, as if dressed for dinner, sat on Herzog's lawn. He has the profile of a thin man. His nose is sharp but his throat sags and his cheeks hang a little toward the lips."<sup>71</sup> Power without substance is suggested in the following observation: "[T]he great personage seemed an expanding man. Unfortunate from a tailoring point of view, the cross-folds in the middle of a buttoned black coat added to the impression, as if the fastenings of the garment were tried to the utmost."<sup>72</sup> Now consider how some of the artist's story might be told with similar craft to that of the Thayer Street description, which shows the writer's concern that although on the surface there may be reason to relax, on a deeper level, the facts give reason to expect an unfortunate disruption:

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<sup>70</sup> VLADIMIR NABOKOV, *LOLITA* 179 (Vintage Int'l ed. 1997) (1955).

<sup>71</sup> BELLOW, *supra* note 31, at 69.

<sup>72</sup> JOSEPH CONRAD, *THE SECRET AGENT* 118 (Anchor Books ed. 1953) (1907).

“The movers had worked for other museums, but they had never moved a sculpture with such large dimensions or constructed of such heavy materials.” Here is a possible sentence for the museum’s statement of the case, which like the description of the tight black coat, suggests that its subject has reached an unreasonable extreme: “The artist wrote to the Chairman that she ‘strenuously’ objected to the Board’s decision to relocate the work and threatened to ‘take it off your hands altogether’ if she did not get her way.”

A more complex example shows how different one character’s point of view can be from another’s. By the page on which Isabel Archer in *The Portrait of a Lady* speaks the following words, Henry James has sufficiently developed the personalities of Lord Warburton and Mr. Osmond for the reader to like the former and distrust the latter. But Isabel has chosen to see only parts of these men and so has misjudged them. She explains to her cousin why she has defied her aunt, his mother, in accepting Mr. Osmond’s marriage proposal after having rejected Lord Warburton’s:

You[r] mother has never forgiven me for not having come to a better understanding with Lord Warburton, and she’s horrified at my contenting myself with a person who has none of his great advantages — no property, no title, no honours, no houses, nor lands, nor position, nor reputation, nor brilliant belongings of any sort. It’s the total absence of all these things that pleases me. Mr. Osmond’s simply a very lonely, a very cultivated and a very honest man — he’s not a prodigious

proprietor.<sup>73</sup>

If one were writing a brief in support of Mr. Osmond's position against Lord Warburton's, one might similarly focus on Lord Warburton's wealth and position to suggest that he lacks "cultivation," a quality that Isabel values. But one might support Lord Warburton's position by suggesting that Osmond, precisely because he lacks wealth and position, is marrying Isabel for her money. Lord Warburton is above suspicion on that score. Similarly, legal writers need to explore the psychology of the parties in order to validate the motives of their clients and render those on the opposite side suspect.

Divergent points of view also characterize the following interaction quite differently in *Jude the Obscure*:

She wondered why he did not put his arm round her waist, but he did not; he merely said what to himself seemed a quite bold enough thing: "Take my arm." She took it thoroughly, up to the shoulder. He felt the warmth of her body against his, and putting his stick under his other arm held with his right hand her right as it rested in its place. "Now we are well together, dear, aren't we?" he observed. "Yes," said she; adding to herself: "Rather mild!" "How fast I have become!" he was thinking.<sup>74</sup>

In all the above examples, the authors use many adjectives and adverbs, and draw many conclusions, but only in conjunction with descriptions that portray what each character experiences.

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<sup>73</sup> JAMES, *supra* note 42, at 398.

<sup>74</sup> HARDY, *supra* note 45, at 50.

The writers ask, as drafters of legal briefs should, what each character sees and how he or she reacts. The reader is not told what to think, but rather is invited into the characters' heads, to understand what they think.

### 9. *Maintain Your Theory of the Case*

What is the most compelling reason your client should win? I tell my students to make this their "theory of the case." The client's point of view presents the "what" and the theory of the case presents the "why," the "idea on which a [court's] decision can be based."<sup>75</sup> "Judges have their selling points, and both lawyers and judges use the word *theory* to refer to the collection of ideas that, in a given case, a lawyer offers for purchase."<sup>76</sup> Offer up the rationale on which the judge can base a holding in your client's favor. Another way of understanding the theory of the case is to think of which "level" of argument, policy, rule of law, or specific fact application, is "least vulnerable"<sup>77</sup> to your adversary's best argument. Whether you focus your lens widely or narrowly<sup>78</sup> depends on which perspective seems most convincing.

An important element in formulating your theory of the case is speaking to your audience. Given the area of law, the court considering your client's case, and your client's dispute, what is your court likely to focus on? If an area of tort law is developing a

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<sup>75</sup> NEUMANN, *supra* note 29, at 275.

<sup>76</sup> NEUMANN, *supra* note 29, at 275.

<sup>77</sup> GLASER ET AL., *supra* note 35, at 321-22.

<sup>78</sup> See OATES ET AL., *supra* note 52, at 321.

more plaintiff-friendly face and you are representing the defendant, do not use rules of law as your theory of the case; use your facts. You might use policy if arguing before judges who tend to examine legislative history every time they interpret statutes, but not if they are known to be skeptical of legislative history's value. Do not make Mr. Verloc's mistake in the next passage, as he tries to convince his wife that they can successfully plan a future together. He appeals to her at the conclusion of a plot gone awry, one in which he was involved and which resulted in her brother's death. Mr Verloc argues policy, that they can begin a new life if only they are determined enough. But Mrs. Verloc sees only the facts of the case, that her husband was responsible for her brother Stevie's demise, and so is obviously not convinced:

His first really confidential discourse to his wife was optimistic from conviction. He also thought it good policy to display all the assurance he could muster. It would put heart into the poor woman. . . . He waved his hand. He seemed to boast. He wished only to put heart into her. It was a benevolent intention, but Mr. Verloc had the misfortune not to be in accord with his audience. . . . Her black glance followed that man who was asserting his impunity — the man who had taken poor Stevie from home to kill him somewhere.<sup>79</sup>

When brief writers decide to base their cases on policy, the most abstract and widest of theories, they might follow the concept below. The idea expressed in this excerpt from *The Heart of the*

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<sup>79</sup> CONRAD, *supra* note 72, at 206.

*Matter* is that we are attracted to failure rather than success; we love what we want to protect. The idea is more compelling than any particulars might be:

[W]hat was this emotion if it were not love? This hungry absorption of what he was never going to see again? The greying hair, the line of nerves upon the face, the thickening body held him as her beauty never had. . . . It isn't beauty that we love, he thought, it's failure – the failure to stay young for ever, the failure of nerves, the failure of the body. Beauty is like success: we can't love it for long. He felt a terrible desire to protect – but that's what I'm going to do, I'm going to protect her from myself for ever.<sup>80</sup>

The idea itself is also compelling in this succinct but insightful comparison from *Middlemarch*: “[T]o have a discussion coolly waived when you feel that justice is all on your own side is even more exasperating in marriage than in philosophy.”<sup>81</sup>

The next level of theory, based on legal rules, involves arguing that principles are fixed. The rule itself is what persuades (even though back when we were writing objective memorandum analysis, we needed to prove by application to persuade). For example, this passage from *Herzog* argues that we cannot overcome psychological damage from our childhoods: “We must be what we are. That is necessity. . . . This was what infantile fixations did to you, early traumata, which a man could not molt

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<sup>80</sup> GREENE, *supra* note 28, at 234-35.

<sup>81</sup> ELIOT, *supra* note 3, at 258.

and leave empty on the bushes like a cicada.”<sup>82</sup>

Finally, when the specifics of one story, the facts, are most convincing, the advocate should focus the lens narrowly. Here, a city is ruined because langoors have destroyed its actual structures, not because people have left it. It says nothing about whether other cities, also abandoned by humans, are also ruined; we are convinced only that ruin results from this kind of destruction to this particular place:

The ruined city, having been deserted by people, is now the abode of langoors. Long-tailed and black-faced, the monkeys are possessed of an overriding sense of mission. Upupup they clamber, leaping to the topmost heights of the ruin, staking out territories, and thereafter dedicating themselves to the dismemberment, stone by stone, of the entire fortress.<sup>83</sup>

### 10. *Tell a Story*

Good stories have strong narratives.<sup>84</sup> They have characters with whom the reader can identify, and a narrator whose voice is personable.<sup>85</sup> The narrator sticks to a theme.<sup>86</sup> The plot is lively and the sequence of events builds to a dramatic climax.<sup>87</sup>

In an appellate brief, obviously the statement of the case must tell a good story. But so should the argument section.

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<sup>82</sup> BELLOW, *supra* note 31, at 66-67.

<sup>83</sup> SALMAN RUSHDIE, *MIDNIGHT'S CHILDREN* 96 (Penguin ed. 1991) (1980). The non-word “upupup” is used by Rushdie for its rhythm and imagery, and is clearly not a model for legal writing vocabulary.

<sup>84</sup> BROOKS ET AL., *supra* note 66, at 5-6.

<sup>85</sup> BROOKS ET AL., *supra* note 66, at 9-13.

<sup>86</sup> BROOKS ET AL., *supra* note 66, at 15-17.

<sup>87</sup> BROOKS ET AL., *supra* note 66, at 7-9.

Classic advice for legal writers says that one's strongest argument should come first.<sup>88</sup> Succeeding arguments generally follow in descending order of strength, though strong endings are also advised.<sup>89</sup> I prefer to think of this development of arguments as plot development,<sup>90</sup> which helps derail a student's tendency to analyze a list of issues rather than a web of connected questions, a tendency that too often follows from the samples and outlines in the textbooks.<sup>91</sup> Although the sample briefs in the textbooks, based on those outlines, usually do an excellent job of developing their plots, my students do not always make the creative leap from the need to organize issues and ideas separately in an outline to the need to make them flow in exposition.

Here are three passages in which a multitude of ideas flow. In each, the prose is so clear that each issue remains distinct, yet the relationships among them are built by the juxtaposition of clauses. The narrator's theme is always apparent. Events occur in dramatic sequence.

One summer afternoon Mrs. Oedipa Maas came home from a Tupperware party whose hostess had put perhaps too much kirsch in the fondue to find that she, Oedipa, had been named executor, or she supposed executrix, of the estate of one Pierce

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<sup>88</sup> See, e.g., CAROLE C. BERRY, *EFFECTIVE APPELLATE ADVOCACY: BRIEF WRITING AND ORAL ARGUMENT* 105-06 (3d ed. 2003); OATES ET AL., *supra* note 52, at 324.

<sup>89</sup> OATES ET AL., *supra* note 52, at 324.

<sup>90</sup> Plot is "the writer's arrangement of the happenings in the story," BARNET ET AL., *supra* note 65, at 443.

<sup>91</sup> See, e.g., GERTRUDE BLOCK, *EFFECTIVE LEGAL WRITING FOR LAW STUDENTS AND LAWYERS* 234-40 (5th ed. 1999); DERNBACH ET AL., *supra* note 57, at 227-33; OATES ET AL., *supra* note 52, at 356-58.



Inverarity, a California real estate mogul who had once lost two million dollars in his spare time but still had assets numerous and tangled enough to make the job of sorting it all out more than honorary.<sup>92</sup>

The theme here is that Oedipa Maas faces a complex challenge. The issues are, first, that she did not expect to be chosen for such a challenge because she is only a housewife, and second, that the job is difficult because the estate she has been asked to administer is large and untidy. She is, moreover, slightly tipsy, which makes the news all the more baffling.

Mrs. Stokes was a communicative person, and quickly told all she knew about Mr. Sharp; how dissolute and poor he was; how good-natured and amusing; how he was always hunted by bailiffs and duns; how, to the landlady's horror, though she never could abide the woman, he did not marry his wife till a short time before her death; and what a queer little wild vixen his daughter was; how she kept them all laughing with her fun and mimicry; how she used to fetch the gin from the public-house, and was known in all the studios in the quarter – in brief, Mrs. Bute got such a full account of her new niece's parentage, education, and behaviour as would scarcely have pleased Rebecca, had the latter known that such inquiries were being made concerning her. Of all these industrious researches Miss Crawley had the full benefit. [Rebecca Sharp] was the daughter of an opera-girl. She had danced herself. She had been a model to the painters. She was brought up as became her mother's daughter.

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<sup>92</sup> THOMAS PYNCHON, *THE CRYING OF LOT 49* 1 (Bantam Books ed 1967) (1965).

She drank gin with her father.<sup>93</sup>

The narrator above sums up for the reader after providing a vivid description of one character, Rebecca, by another, the garrulous Mrs. Stokes. The craft expertly follows the legal writing dictum to “argue your facts”: quote or paraphrase the testimony or the documents, then summarize to draw your legal conclusion.

In the last letter she had from him he told her that he was practising in Geneva, New York, and she got the impression that he had settled down with some one to keep house for him. She looked up Geneva in an atlas and found it was in the heart of the Finger Lakes Section and considered a pleasant place. Perhaps, so she liked to think, his career was biding its time, again like Grant's in Galena; his latest note was post-marked from Hornell, New York, which is some distance from Geneva and a very small town; in any case he is almost certainly in that section of the country, in one town or another.<sup>94</sup>

Can you feel the subject of this passage fading away? He is established in an attractive, well known city, with domestic help, but his career appears to be stalled; then he moves to smaller town in a more remote area of the state, his correspondence dwindles, his whereabouts are now unknown, though we assume he has not the means to move far from his last known residence. Likewise, stories can be told in the argument section of a brief in a manner that quietly conveys the tragedy of what happened to the appellant

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<sup>93</sup> THACKERAY, *supra* note 40, at 229.

<sup>94</sup> FITZGERALD, *supra* note 32, at 315.

when the court below interpreted the law incorrectly, or what will happen if the current court affirms. Legal writers can relate the sequence of events that followed or will follow inexorably from the wrong judicial decision.

Character development, once begun in the statement of the case, needs to continue in the argument section of a brief. Descriptions of people, places and experiences must be vivid. Even the driest commercial case has to touch the reader on an emotional level. If the actors are not terribly interesting, perhaps the setting is, or the event or the time. In the next three excerpts, stories of a place, an event, and a character, respectively, dramatically warn the reader against the subject described. The first passage, from *Lolita*, is one of several of Nabokov's notorious descriptions of the American "motor court" motel of the 1950s:

In these frightening places we paid ten for twins, flies queued outside at the screenless door and successfully scrambled in, the ashes of our predecessors still lingered in the ashtrays, a woman's hair lay on the pillow, one heard one's neighbor hanging his coat in his closet, the hangers were ingeniously fixed to their bars by coils of wire so as to thwart theft, and, in crowning insult, the pictures above the twin beds were identical twins.<sup>95</sup>

In the second, DeLillo retells a story that everyone already knows: James Dean's car crash. This rendition makes us gasp, taking our breath away along with Dean's:

The silver Porsche approaches an intersection,

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<sup>95</sup> NABOKOV, *supra* note 70, at 210.

going like a streak. No time to brake for the Ford sedan. Glass shatters, metal screams. Jimmy Dean sits in the driver's seat with a broken neck, multiple fractures and lacerations. It is five forty-five in the afternoon, Pacific Coast Time.<sup>96</sup>

Last, this story of a seduction instructs us not so much about what to write but about how to convince an audience. Like Dreiser's Hurstwood, the "he" of this passage, advocates need to make their readers want what the client wants by making them feel the client's experiences. "Judges have their selling points."<sup>97</sup>

He drew up his chair and modulated his voice to such a degree that what he said seemed wholly confidential. He confined himself almost exclusively to his observation of men and pleasures. He had been here and there, he had seen so and so. Somehow he made Carrie wish to see similar things, and all the while kept her aware of himself. She could not shut out the consciousness of his individuality and presence for a moment. He would raise his eyes slowly in smiling emphasis of something, and she was fixed by their magnetism. He would draw out with the easiest grace her approval. Once he touched her hand for emphasis and she only smiled.<sup>98</sup>

### 11. *Argue in the Alternative*

Students who suffer from the misapprehension that there is one correct interpretation of a statute or common law rule cannot accept argument in the alternative. That one advocate can

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<sup>96</sup> DELILLO, *supra* note 60, at 69.

<sup>97</sup> NEUMANN, *supra* note 29, at 257; *see* discussion *supra* Part II.B.9.

<sup>98</sup> DREISER, *supra* note 38, at 117.

articulate two arguments that are inconsistent with one another is intensely uncomfortable. Practicing lawyers, in contrast, do not feel uncomfortable with this approach. After all, skilled, ethical advocates face each other in court every day to argue opposite interpretations of the law.<sup>99</sup> The step from adversary arguments made between two lawyers and inconsistent arguments leading to the same result made by one lawyer is not that great.<sup>100</sup>

The easiest way to reconcile alternative arguments is to set them up to operate under different conditions. They are not formally inconsistent; they merely exist in separate theoretical universes: “He was willing to offer her help, if she wanted any from him or receive her anger, if she harbored any against him.”<sup>101</sup> If she wants help, he will offer help; if she wants to vent her anger, he will accept the anger. Here is a petty character’s oppositional feelings about the Perry Mason television series, which support the view that if conditions allow, one should try to achieve alternative A, but if conditions do not allow, one should try alternative B, the “fall-back” position:<sup>102</sup> “Roseman cherished a fierce ambivalence, wanting at once to be a successful trial lawyer like Perry Mason and, since this was impossible, to destroy Perry Mason by

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<sup>99</sup> DEBORAH A. SCHMEDEMAN & CHRISTINA L. KUNZ, *SYNTHESIS: LEGAL READING, REASONING AND WRITING* 184 (2d ed. 2003).

<sup>100</sup> *See id.* at 183. The logical structure of argument in the alternative typically takes one of the following forms:

“ ‘X is true. Whether X is true or not, Y is true.’ . . . ‘X is true. Even if X is false, Y is true.’ ” *Id.*

<sup>101</sup> MORRISON, *supra* note 20, at 172.

<sup>102</sup> INTRODUCTION TO ADVOCACY: RESEARCH, WRITING AND ARGUMENT 64 (Gregory Lantier et al. eds., 7th ed. 2002).

undermining him.”<sup>103</sup> In this next passage, all reasoning leads inevitably to the conclusion that Pearl must be separated from her mother: either she is evil, in which case she must not jeopardize her mother’s salvation, or she is not evil, in which case her mother must not jeopardize Pearl’s salvation.

On the supposition that Pearl, as already hinted, was of demon origin, these good people not unreasonably argued that a Christian interest in the mother’s soul required them to remove such a stumbling-block from her path. If the child, on the other hand, were really capable of moral and religious growth, and possessed the elements of ultimate salvation, then, surely it would enjoy all the fairer prospect of these advantages by being transferred to wiser and better guardianship than Hester Prynne’s.<sup>104</sup>

The most powerful alternative argument presents both possible interpretations and then links them to show why the adversary argument is not possible:

Midnight’s children can be made to represent many things, according to your point of view; they can be seen as the last throw of everything antiquated and retrogressive in our myth-ridden nation, whose defeat was entirely desirable in the context of a modernizing, twentieth-century economy; or as the true hope of freedom, which is now forever extinguished; but what they must not become is the bizarre creation of a rambling, diseased mind.<sup>105</sup>

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<sup>103</sup> PYNCHON, *supra* note 92, at 8.

<sup>104</sup> HAWTHORNE, *supra* note 59, at 92.

<sup>105</sup> RUSHDIE, *supra* note 83, at 240.

Midnight's children represent vestigial notions, well rid if you believe that what has replaced them is better but mourned if you believe that what has replaced them is worse. In either instance, they represent something real; they are not imaginary.

Finally, the following technique is useful when interpreting legislative intent. No matter which purpose was meant, the interpretation of the statutory rule remains the same because it furthers both. In *Pride and Prejudice*, Darcy declines an invitation to join Miss Bingley and Elizabeth Bennet in their walk around the room:

You either choose this method of passing the evening because you are in each other's confidence, and have secret affairs to discuss, or because you are conscious that your figures appear to the greatest advantage in walking; if the first, I should be completely in your way, and if the second, I can admire you much better as I sit by the fire.<sup>106</sup>

By studying the writings above, a student drafting a brief can ponder how to present alternative arguments without apparent inconsistency. Emphasize different possible conditions, or the fallacy of the adversary's argument, or the policy furthered by all the alternatives.

## 12. *Use Persuasive Language*

Any advice to use persuasive language in an advocacy document sounds too obvious even to consider. But students

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<sup>106</sup> AUSTEN, *supra* note 34, at 42.

amaze me, year after year, with their neutrality in appellate brief assignments. Mimicking the phrasing in judicial opinions, they write that the law “provides” or worse, “says.” How about “mandates” or “requires,” equally lawyerly words that argue rather than analyze? “An important point in the case” should read “crucial to the case.” The client’s situation should not be described as “similar to” or “resembling” that in a favorable case, but rather “just like,” “the same as,” or even “identical to.”

When making comparisons, students should take cues from lines such as this from *A Farewell to Arms*: “The war seemed as far away as the football games of some one else’s college.”<sup>107</sup> The comparison is direct and the use of the verb “seemed” is intentional rather than unthinking: we keep track of other schools’ teams, we know those teams are of passionate interest to the other schools, but they do not feel close to us because we care most about the home team. So, too, a war fought on another continent, though engaged in by men just like us and which we acknowledge to be important, feels far away.

When describing part of the story, language should be forceful, like this passage from the same novel: “We stood in the rain and were taken out one at a time to be questioned and shot. So far they had shot every one they had questioned. The questioners had that beautiful detachment and devotion to stern justice of men dealing in death without being in any danger of it.”<sup>108</sup> Persuasive

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<sup>107</sup> HEMINGWAY, *supra* note 25, at 291.

<sup>108</sup> HEMINGWAY, *supra* note 25, at 224-25.



language involves direct statements and strong images; it also involves compelling logic, a combination of examples to prove one's point and to reach conclusions that characterize. Not only does all analysis lead to the same result, but that result is something the reader should care about. Persuasion ideally invokes both emotion and intellect. The starkness of execution after interrogation described above shocks the reader. Extreme, perhaps, as a model for an appellate brief. Less extreme but equally gripping is the following, from *Beloved*:

[T]here was no way in hell a black face could appear in a newspaper if the story was about something anybody wanted to hear. A whip of fear broke through the heart chambers as soon as you saw a Negro's face in a paper, since the face was not there because the person had a healthy baby, or outran a street mob. Nor was it there because the person had been killed, or maimed or caught or burned or jailed or whipped or evicted or stomped or raped or cheated, since that could hardly qualify as news in a newspaper. It would have to be something out of the ordinary – something white people would find interesting, truly different, worth a few minutes of teeth sucking if not gasps. And it must have been hard to find news about Negroes worth the breath catch of a white citizen of Cincinnati.<sup>109</sup>

“There was no way,” “the face was not there because . . . nor was it there because . . . since that would hardly qualify,” “it would have to be something out of the ordinary,” “it must have

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<sup>109</sup> MORRISON, *supra* note 20, at 155-56.

been hard to find.” These phrases are the persuasive analysis; the emotional conclusion is that a “whip of fear broke through the heart chamber” because news was scarce that was “worth the breath catch.”

### 13. *Employ the Passive Voice Wisely*

Poor writers abuse the passive voice. Legal writing texts and teachers admonish students against it. Generally, passives use more words than necessary, dull the prose because they remove the action, and can create ambiguity.<sup>110</sup> Much as I hesitate to discuss proper use of passive constructions to students, who write sentences like this one all the time: “It is suspicious that in a newspaper article featuring our client, she was not interviewed,” when we turn to the advocacy part of the course, I risk it. Sometimes, the action is what matters rather than the actor, and sometimes the actor is unknown.<sup>111</sup> But the most effective uses of the passive voice in persuasion are either to deflect attention from the actor or to emphasize the universality of an idea. The classic example of the first use is when you represent the defendant in a criminal case: “The victim was shot.”<sup>112</sup> The classic example of the second is “We hold these truths to be self-evident, that all men

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<sup>110</sup> See RICHARD C. WYDICK, *PLAIN ENGLISH FOR LAWYERS* 29-34 (4th ed. 1998).

<sup>111</sup> *Id.* at 33.

<sup>112</sup> See *id.* at 33. But see Lee, *supra* note 69, at 630. “The problem with deemphasizing the actor through passive voice is that the technique is too obvious.” *Id.* Professor Lee proposes alternative techniques, such as burying “bad” action in subordinate clauses. *Id.*

are created equal.”<sup>113</sup>

The former of these two effective uses of passive phrasing is exemplified by this polite passage from *Great Expectations*, where Herbert deflects responsibility from his friend Pip, whom he affectionately addresses as Handel, for Pip’s lack of etiquette. The utensils become the focus of the description rather than the person eating with them:

Let me introduce the topic, Handel, by mentioning that in London it is not the custom to put the knife in the mouth — for fear of accidents — and that while the fork is reserved for that use, it is not put further in than necessary. It is scarcely worth mentioning, only it’s as well to do as other people do. Also, the spoon is not generally used overhand, but under.<sup>114</sup>

The latter use is the more subtle challenge: when should an advocate describe a situation as something that absolutely everyone agrees with? Rules are easily made into self-evident truths, as one of the most famous opening lines of any novel written in the English language informs us: “It is a truth universally acknowledged, that a single man in possession of a good fortune must be in want of a wife.”<sup>115</sup> Perhaps even more powerful, though, is writing a factual description in the passive voice. I have used the following excerpt from Petitioner’s brief in *Bush v. Gore*<sup>116</sup> as a teaching example; it reminds me of the excerpt

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<sup>113</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

<sup>114</sup> DICKENS, *supra* note 19, at 166.

<sup>115</sup> AUSTEN, *supra* note 34, at 3.

<sup>116</sup> 531 U.S. 98 (2000).

just below it from *Middlemarch*. Both describe an experience that has led to the current state of confusion. In the *Bush* brief, surely the whole world agrees that the Democrats are at fault for creating the untenable delay in determining the outcome of the election. In the *Middlemarch* passage, surely the whole world agrees that Casaubon prepared himself admirably for marital bliss, and is equally mystified when the bliss does not materialize:

[M]ore than a month after the November 7 presidential election, the outcome of that election remains shrouded in uncertainty, confusion, and intense controversy. The thirty-three days since the election have been characterized by widespread turmoil resulting from the selective, arbitrary, changing, and standardless manual recounts of ballots in four Florida counties pursuant to requests made on behalf of Democratic presidential candidate Vice President Gore.<sup>117</sup>

Poor Mr. Casaubon had imagined that his long studious bachelorhood had stored up for him a compound interest in enjoyment, and that large drafts on his affections would not fail to be honoured. . . . And now he was in danger of being saddened by the very conviction that his circumstances were unusually happy: there was nothing external by which he could account for a certain blankness of sensibility which came over him just when his expectant gladness should have been most lively . . . .<sup>118</sup>

Differences in twentieth versus nineteenth century styles

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<sup>117</sup> Brief for George W. Bush and Richard Cheney at 4, *Bush v. Gore*, 531 U.S. 98 (2000) (No. 00-949).

<sup>118</sup> ELIOT, *supra* note 3, at 76.

notwithstanding, both passages show the power of describing an event or a person with detachment. If the manual recounts had “caused the turmoil that characterized the days” since the election, a narrow circumstance would have been responsible for a limited problem, but since those days “have been characterized” by “turmoil resulting from” the recounts, both the cause and the effect sound overwhelming. The blame for the controversy also falls harder on the Democrats when the recounts were done “pursuant to requests made on behalf of” Vice President Gore than it would have if the Vice President had “requested the recounts.” The latter sounds polite; the former sounds demanding and intentionally dilatory. Mr. Casaubon is an object of pity rather than scorn for having expected that “drafts on his affection would not fail to be honoured,” while the opposite might have been the sense conveyed if he had expected to “draw upon his savings in future enjoyment.” He is puzzled because a “blankness of sensibility . . . came over him,” while he would have only himself to blame if he “felt a blankness of sensibility.”

#### ***14. Craft Elegant Phrases***

I have intentionally numbered the sections of this article in a single sequence because good objective analysis, good advocacy, and good writing form a continuum. Legal writing skills build on basic composition skills. An elegant turn of phrase sharpens the reader’s appreciation of the idea being expressed and better convinces the reader that the writer knows what he or she is talking

about. In addition, legal analysis can be dry. Establishing that all the elements of a statute have been met can be tedious, if every element is described and applied in the same way. Variations in word choice and word arrangement add interest without disturbing the logical progression.

Students often fear that they will lose precision of terminology if they vary the language. For example, in my assignment about employment discrimination, one student painstakingly progressed through the definition section of the Civil Rights Act, 42 U.S.C. § 2000e:

The company is a person because it is a corporation.  
The company is an employer because it is a person  
engaged in an industry affecting commerce. It  
affects interstate commerce because its sales force  
drives in the surrounding areas to solicit new sales.  
The surrounding areas of metropolitan New York  
include New Jersey and Connecticut.

To my ear, this analysis was anything but elegant. This student could take a page, almost any page, from *The Age of Innocence* to find a model for streamlining her prose. See how Edith Wharton establishes the equivalent of statutory elements here:

In the course of the next day the first of the usual betrothal visits were exchanged. The New York ritual was precise and inflexible in such matters; and in conformity with it Newland Archer first went with his mother and sister to call on Mrs. Welland, after which he and Mrs. Welland and May drove out to old Mrs. Manson Mingott's to receive that

venerable ancestress's blessing.<sup>119</sup>

Following the example, a student could write: "The company meets the statutory definition of employer, as it is a corporation and therefore a person, and it affects interstate commerce by engaging its sales force in New Jersey and Connecticut as well as New York."

A variation on this theme is the following description of a car crash, or more accurately, of a diagram showing the crash, in which a vehicle collided with a pedestrian, Mrs. H. H., after swerving to avoid hitting a dog owned by a family named Junk. The second sentence arranges the clauses to show both the action and the inevitability of the crash:

Mrs. H. H.'s trajectory was illustrated at several points by a series of those little outline figures – doll-like wee career girl or WAC – used in statistics and visual aids. Very clearly and conclusively, this route came into contact with a boldly traced sinuous line representing two consecutive swerves – one which the Beale car made to avoid the Junk dog (dog not shown), and the second, a kind of exaggerated continuation of the first, meant to avert the tragedy.<sup>120</sup>

Legal writers should not fear long sentences, despite the common accusation that lawyers lose their points somewhere in the middle of their overlong strings of words. I am not advocating

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<sup>119</sup> WHARTON, *supra* note 17, at 23. Modern punctuation would probably replace the semicolon in the second sentence with a colon and eliminate the word "and" immediately following.

<sup>120</sup> NABOKOV, *supra* note 70, at 102.

that we write like legislatures, creating dependent clauses within clauses within clauses; rather, I advocate that we vary the length and grammatical structure of sentences and clauses to make our writing easier and more interesting to read. The excerpt just above is a good example, as is this, just below. In both, note how the references at the end of the sentences (“the tragedy” above and “the shock” below) are clear, despite their lengthy separation from the initial mention of the occurrences to which they refer, because the phrasing and the words are so aptly chosen.

When Mrs. Bute Crawley, numbed with midnight travelling, and warming herself at the newly crackling parlour fire, heard from Miss Briggs the intelligence of the clandestine marriage, she declared it was quite providential that she should have arrived at such a time to assist poor dear Miss Crawley in supporting the shock . . . .<sup>121</sup>

### **15. *Link Related Ideas***

Elegant juxtaposition of clauses provides the perfect framework for linking ideas. Legal analysis always needs to link ideas. The definition of “employer” in 42 U.S.C. § 2000e depends on the definition of the word “person,” which depends on whether an entity is, among other possibilities, a corporation. I once used a hypothetical in which the subject of a newspaper article sued the publisher for libel. A student wrote the following about the so-called “malice” element of the offense: “A plaintiff must show that

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<sup>121</sup> THACKERAY, *supra* note 40, at 193.



the publisher was ‘grossly irresponsible’ when it published the allegedly libelous article. The burden of proving liability depends upon whether the information about an individual is within the ‘sphere of legitimate public concern.’ ” These two sub-elements can easily be linked in one sentence: “A plaintiff must show that the publisher was ‘grossly irresponsible’ in publishing information considered to be within the ‘sphere of public concern.’ ”

Related ideas are smoothly linked in these sentences: “Mr. Verloc, returning from the Continent at the end of ten days, brought back a mind evidently unrefreshed by the wonders of foreign travel and a countenance unlighted by the joys of home-coming.”<sup>122</sup> “That night a bat flew into the room through the open door that led onto the balcony and through which we watched the night over the roofs of the town.”<sup>123</sup> “She could not see why he should bother to invent a new army stirrup and she was really enraged when, after the invention was mature, he made a present to the War Office of the designs and the patent rights.”<sup>124</sup>

Related ideas can also be skillfully linked in a series of sentences. Notice the rhythm of this passage, as well as the relationship of images, as it progresses from short to long sentences. A person feels the satisfaction of drawing fresh water from a well, and the water is tasty, but it needs to be boiled, because animals die in the well. Nature deceives us.

The cistern was full. He raised the iron lid with a

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<sup>122</sup> CONRAD, *supra* note 72, at 154.

<sup>123</sup> HEMINGWAY, *supra* note 25, at 101.

<sup>124</sup> FORD, *supra* note 55, at 195.

pry bar and put down a bucket. It made a good sound, dropping, and you couldn't get softer water anywhere, but it had to be boiled. There was always a chipmunk or two, a rat, dead at the bottom though it looked pure enough when you drew it up, pure, green water.<sup>125</sup>

### 16. *Use Active Verbs*

I have never quite understood other people's fondness for the passive voice, unless strategically employed in a persuasive context. Why does "there is a lack of judicial decisions regarding" feel more natural to my students than "courts have not yet considered"? "Our client's case can be viewed as distinctive from" more so than "our client's case differs from"? "It was argued by the defendant" rather than "the defendant argued"? Some of a law student's aversion to the active voice stems from his or her desire for objectivity, which conjures up phrases such as "there is" and "can be viewed as" because the lack of an actor is precisely what the student seeks, a statement of being rather than of interpretation. But students mistake what Richard Wydick calls "cosmic detachment"<sup>126</sup> for objectivity. Readers of memoranda seek the writer's own interpretation, as long as it strives to analyze rule application the way a court might rather than the way the writer wants. Students may also unthinkingly use passives because they otherwise would struggle to describe multiple actions with multiple actors. Changing subjects requires skill; otherwise, the

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<sup>125</sup> BELLOW, *supra* note 31, at 322.

<sup>126</sup> WYDICK, *supra* note 110, at 76-77.

actions become confused. The way to combat this is to focus on who did what to whom,<sup>127</sup> unless a writer consciously prefers the passive to remove responsibility from an actor or to convey a universal truth.<sup>128</sup>

These three excerpts are wonderful examples of how to change subjects without creating confusion. Who did what to whom is never in doubt. The first passage, from *Jude the Obscure*, is particularly interesting because all the action takes place in one sentence and because the verb tenses change several times. The second, from *Vanity Fair*, is noteworthy for its choice of verbs, all three of which connote additional significance to the action. The last, from *The Heart of the Matter*, is striking for its change of actor, from the person who activates the soda siphon to the soda itself.

The landlord of the lodging, who had heard that they were a queer couple, had doubted if they were married at all, especially as he had seen Arabella kiss Jude one evening when she had taken a little cordial; and he was about to give them notice to quit, till by chance overhearing her one night haranguing Jude in rattling terms, and ultimately flinging a shoe at his head, he recognized the note of genuine wedlock; and concluding that they must be respectable, said no more.<sup>129</sup>

That very day Miss Crawley left off her afternoon dose of medicine: that afternoon Bowls opened an independent bottle of sherry for himself and Mrs.

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<sup>127</sup> WYDICK, *supra* note 110, at 17, 77.

<sup>128</sup> See discussion *supra* Part II.B.18.

<sup>129</sup> HARDY, *supra* note 45, at 406.

Firkin: that night Miss Crawley and Miss Briggs indulged in a game of piquet instead of one of Porteus's sermons.<sup>130</sup>

Yusef dragged the syphon towards him across the table, knocking over the bromide glass; he turned the nozzle towards his face and pulled the trigger. The soda water broke on his face and splashed all round him on the mauve silk.<sup>131</sup>

### 17. *Be Concise*

The single most frequent comment I make on student papers is probably “say this more concisely.” Using active verbs is an important means of being succinct, as is eliminating long introductory phrases such as “it is important to point out that” and “the problem lies in the fact that.” Editing for these two writing problems is easier than editing for economy’s sake alone. When I tell a student to “edit down,” I mean “do not waste words — make your sentences sound like these”: In the first example, a character from *The Secret Agent* describes the bomb he carries around undetected, and which he can detonate instantaneously. In the second, the protagonist of *Invisible Man* describes his new mentor, and in the third, Dr. Lydgate, in *Middlemarch*, explains to his wife the significance of being in debt:

I walk always with my left hand closed round the india-rubber ball which I have in my trouser pocket. The pressing of this ball actuates a detonator inside the flask I carry in my pocket. It's the principle of the pneumatic instantaneous shutter for a camera . .

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<sup>130</sup> THACKERAY, *supra* note 40, at 308.

<sup>131</sup> GREENE, *supra* note 28, at 131.

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A tall, friendly man, a lawyer and the Brotherhood's chief theoretician, he had proved to be a hard taskmaster. Between daily discussions with him and a rigid schedule of reading, I had been working harder than I'd ever found necessary at college.<sup>133</sup>

That was only a security and behind that security there is a debt. And that debt must be paid within the next few months, else we shall have our furniture sold. If young Plymdale will take our house and most of our furniture, we shall be able to pay that debt, and some others too, and we shall be quit of a place too expensive for use. We might take a smaller house: Trumbull, I know, has a very decent one to let at thirty pounds a year, and this is ninety.<sup>134</sup>

These passages share the virtue of brevity in three quite different scenarios. The anarchist in *The Secret Agent* describes a hypothetical process, the "Brotherhood's" new recruit in *Invisible Man* describes a teacher and a course of study, and the husband in *Middlemarch* describes the practical realities of his financial status. The first exemplifies how one might explain the facts of a case, a few short sentences that crisply describe who, what, when, and how. The second describes how and why, similar to the way one might establish perspective in persuasive writing. The third shows how one might apply a rule and reach a conclusion about

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<sup>132</sup> CONRAD, *supra* note 72, at 65.

<sup>133</sup> ELLISON, *supra* note 50, at 357.

<sup>134</sup> ELIOT, *supra* note 3, at 594.

the client's situation.

These additional passages, quite short, also exemplify, respectively, the same three aspects of legal writing. The facts, who, what, when, how: "I lived happily with Herbert and his wife, and lived frugally, and paid my debts, and maintained a constant correspondence with Biddy and Joe."<sup>135</sup> Perspective: "With the quiet murmured order one gives a sweat-stained distracted cringing trained animal even in the worst of plights . . . I made Lo get up, and we decorously walked, then indecorously scuttled down to the car."<sup>136</sup> Rule and examples: "He knew the secrets of the Ohio River and its banks; empty houses and full; the best dancers, the worst speakers, those with beautiful voices and those who could not carry a tune."<sup>137</sup>

### 18. *Be Precise*

Legal conclusions require precision. What, exactly, is it about your client that will determine whether he or she wins or loses? Precision works on several levels: legal writers must provide the details of what happened, such as quoting the actual words of the contract or describing the size, shape, and appearance of the obstacle over which a tort plaintiff tripped and fell. In addition, legal writers must provide the particular facts to which a rule applies, the determinative facts. If the plaintiff won when the obstacle was a banana peel in a supermarket aisle, will a future

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<sup>135</sup> DICKENS, *supra* note 19, at 446.

<sup>136</sup> NABOKOV, *supra* note 70, at 169.

<sup>137</sup> MORRISON, *supra* note 20, at 170.

plaintiff win when the obstacle is a bunch of bananas, bigger, taller, more visible, less immediately slippery? Writers must also be precise when paraphrasing from a source, extrapolating a rule from a case, or framing a legal conclusion.

Legal definitions, when applied by students, often lack precision. In civil rights laws, for instance, non-discrimination rules apply to “public accommodations” but not to “private” entities.<sup>138</sup> Kiwanis Clubs have been considered “private” by several federal courts<sup>139</sup> because local clubs consist only of two or three-dozen members, admit new members at the rate of no more than one or two per year, if at all, and do not conduct membership drives, but rather consider only applicants who have been personally recommended by current members.<sup>140</sup> One of my students, instead of providing these details, wrote, “The court held that Kiwanis was not a place of public accommodation and was a distinctly private institution because it was a small club where membership availability was scarce and difficult, and there was no public recruitment by the long-term members.” This sentence might be fine as a conclusion, generalizing a rule from the holding, but without the specific facts, it is not precise enough as an explanation. That student can learn from the precision in this passage, which describes two characters in *My Antonia* who got along because they were alike:

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<sup>138</sup> See, e.g., 42 U.S.C. § 2000a (2000); N.J. STAT. ANN. § 10:5-4, 10:5-5(l) (West 2002).

<sup>139</sup> See, e.g., *Kiwanis Int’l v. Ridgewood Kiwanis Club*, 806 F.2d 468 (3d Cir. 1986).

<sup>140</sup> *Id.* at 475-76.

They knew what they liked, and were not always trying to imitate other people. They loved children and animals and music, and rough play and digging in the earth. They liked to prepare rich, hearty food and to see people eat it; to make up soft white beds and to see youngsters asleep in them. They ridiculed conceited people and were quick to help unfortunate ones.<sup>141</sup>

Here are three more examples that combine precise facts with more generalized descriptions:

The supermarket is full of elderly people who look lost among the dazzling hedgerows. Some people are too small to reach the upper shelves; some people block the aisles with their carts; some are clumsy and slow to react; some are forgetful, some confused; some move about muttering with the wary look of people in institutional corridors.<sup>142</sup>

[Daisy was] [a]n utterly steady, reliable woman, responsible to the point of grimness. [She] was a statistician for the Gallup Poll. For Marco's sake she tried to make the house cheerful, but she had no talent for this, and the parakeets and the plants and goldfish and gay reproductions of Braque and Klee from the Museum of Modern Art seemed to increase its sadness.<sup>143</sup>

In the dark narrow passage behind, in the charge-room and the cells, Scobie could always detect the odour of human meanness and injustice – it was the smell of a zoo, of sawdust, excrement, ammonia, and lack of liberty. The place was scrubbed daily,

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<sup>141</sup> WILLA CATHER, *MY ANTONIA* 145 (Bantam Classic ed. 1994) (1918).

<sup>142</sup> DELILLO, *supra* note 60, at 167.

<sup>143</sup> BELLOW, *supra* note 31, at 221.



but you could never eliminate the smell. Prisoners and policemen carried it in their clothing like cigarette smoke.<sup>144</sup>

In each, the precise facts are characterized and either rules are extracted or conclusions drawn. In the first, DeLillo induces a general rule from the particular instances: elderly people find the supermarket difficult to navigate because they are small, forgetful, slow, suspicious. In the second, Bellow concludes that Daisy is grimly reliable because she is a statistician and because she cannot make the pets and plants and artwork with which she has decorated the house seem alive. In the last, Greene proves his conclusion that a prison's smell is indelible. The smell suggests injustice; it is tangible, like the smell of waste, and it infuses the environment like tobacco.

### 19. *Punctuate*

A writer who crafts elegant phrases and links related ideas within a sentence is necessarily a writer who punctuates well. Long sentences read easily and ideas cohere when punctuation is fully exploited.

Examples of poor punctuation are tedious to read; instead of providing some, I will simply summarize: Many students do not know the different functions of a comma and a semicolon, some reverse the use of semicolons and colons, others insert commas where they do not belong, still others (or sometimes the very same

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<sup>144</sup> GREENE, *supra* note 28, at 7.

people) decline to use commas when they are needed. Some students opt for uniformly short sentences and thus avoid having to decide which signs to place at which junctures.

Study the structure of the following sentences. These novelists make their punctuations signs work hard. The signs support active verbs as well as show the relationship of the ideas expressed between them. The first sentence uses only commas, the second uses a colon and commas, and the third uses four different signs (plus, of course, for all, the period at the end). The most instructive way to learn from these examples is to read them along with the pages of a grammar handbook that cover punctuation rules. A student who can match the rule with the example has not only learned how to use commas and semicolons more thoroughly than by reading the grammar book alone, but has also reinforced the legal concept of rule application.

Casting my eyes on Mr. Wemmick as we went along, to see what he was like in the light of day, I found him to be a dry man, rather short in stature, with a square wooden face, whose expression seemed to have been imperfectly chipped out with a dull-edged chisel.<sup>145</sup>

My father was a gentle, easy-going person, a salad of racial genes: A Swiss citizen, of mixed French and Austrian descent, with a dash of the Danube in his veins.<sup>146</sup>

The Professor was not a very strict Hindu – he

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<sup>145</sup> DICKENS, *supra* note 19, at 158.

<sup>146</sup> NABOKOV, *supra* note 70, at 9.

would take tea, fruit, soda-water and sweets, whoever cooked them, and vegetables and rice if cooked by a Brahman; but not meat, not cakes lest they contained eggs, and he would not allow anyone else to eat beef: a slice of beef upon a distant plate would wreck his happiness.<sup>147</sup>

Dashes are discouraged in legal writing because they are informal.<sup>148</sup> Still, they can be more useful than other symbols in contexts similar to that immediately above, to separate a list from the explanation that accompanies it.<sup>149</sup> In persuasive writing, dashes also call attention to the phrase that follows, for example: “[S]he had seen only half his nature then, as one saw the disk of the moon when it was partly masked by the shadow of the earth. She saw the full moon now — she saw the whole man.”<sup>150</sup> Now read the entire passage that ends in these words. The emphasis is even more dramatic. Think of how forceful a dash can be coming at the end of a paragraph in an appellate brief, a paragraph that argues a complex point and concludes with a few summary words following the dash that highlight the point. The technique can have an even more powerful impact than a well-written point heading. In the paragraph below, also note the parallel use of semicolons as the first punctuating sign in the second and fourth sentences and the use of commas elsewhere.

[I]f she had not deceived him in intention she understood how completely she must have done so

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<sup>147</sup> FORSTER, *supra* note 22, at 127.

<sup>148</sup> See, e.g., OATES ET AL., *supra* note 52, at 856.

<sup>149</sup> OATES ET AL., *supra* note 52, at 856-57.

<sup>150</sup> JAMES, *supra* note 42, at 475.

in fact. She had effaced herself when he first knew her; she had made herself small, pretending there was less of her than there really was. It was because she had been under the extraordinary charm that he, on his side, had taken pains to put forth. He was not changed; he had not disguised himself, during the year of his courtship, any more than she. But she had seen only half his nature then, as one saw the disk of the moon when it was partly masked by the shadow of the earth. She saw the full moon now — she saw the whole man.<sup>151</sup>

## 20. *Construct Parallelisms*

Like the parallel use of semicolons by James above, all parallel grammatical constructions make writing more logical, and we all know that law demands logic. Without parallel structures, sentences are not only technically incorrect, they are ambiguous, lacking clear signals as to whether the initial phrase applies to all clauses or just some. Stylistically, parallelisms make one's writing achieve greater flow, a higher degree of sophistication.<sup>152</sup>

The following passage from *Midnight's Children* cannot be used as a model for legal writing in its entirety, given its unorthodox punctuation, but consider the parallel use of the word “by” to list the possible provocations by one character, Mary, ayah to the novel's protagonist when he was a boy, of another, Musa, the oldest servant in the household. In addition to providing

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<sup>151</sup> JAMES, *supra* note 42, at 475.

<sup>152</sup> See DIANA HACKER, RULES FOR WRITERS 110-14 (4th ed. 2000); see also OATES ET AL., *supra* note 52, at 789-90.

clarity, the parallel structure provides rhythm, an aspect of writing craft too often considered the province of poetry but in truth extremely helpful in prose. Rhythm guides identification of main and subordinate ideas in a sentence and builds tension in an argument. It places the most important information in positions of “stress,” where the reader expects the most critical words to appear.<sup>153</sup>

What remnants of guilt fear shame, pickled by time in Mary’s intestines, led her willingly? unwillingly? to provoke the aged bearer in a dozen different ways – by a tilt of the nose to indicate her superior status; by aggressive counting of rosary beads under the nose of the devout Muslim; by acceptance of the title mausi, little mother, bestowed upon her by the other Estate servants, which Musa saw as a threat to his status; by excessive familiarity with the Begum Sahiba . . . .<sup>154</sup>

Rhythm also characterizes these descriptions, first, of Humbert’s relationship with Lolita in *Lolita*; next, of prairie dog tunnels in *My Antonia*, which makes good use of commas and semicolons as well as of two parallelisms:

In her washed-out gray eyes, strangely spectacled, our poor romance was for a moment reflected, pondered upon, and dismissed like a dull party, like a rainy picnic to which only the duller bores had

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<sup>153</sup> See GEORGE D. GOPEN, EXPECTATIONS: TEACHING WRITING FROM THE READER’S PERSPECTIVE (2004). The entire book is about matching what we intend to say to what the reader expects, and letting the reader’s attention guide us in placing information appropriately when we write. Throughout, it addresses when and how to bring out the logic, or conclusion, or contradiction of the situation by paying close attention to stress positions and other aspects of sentence structure.

<sup>154</sup> RUSHDIE, *supra* note 83, at 170.

come, like a humdrum exercise, like a bit of dry mud caking her childhood.<sup>155</sup>

Antonia suggested that we stop at the prairie-dog-town and dig into one of the holes. We could find out whether they ran straight down, or were horizontal, like mole-holes; whether they had underground connections; whether the owls had nests down there, lined with feathers. We might get some puppies, or owl eggs, or snakeskins.<sup>156</sup>

More businesslike cadences are exemplified in these two excerpts:

He did everything quickly, neatly, with skillful Eastern European flourishes: combing his hair, buttoning his shirt, stropping his bone-handled razors, sharpening pencils on the ball of his thumb, holding a loaf of bread to his breast and slicing toward himself, tying parcels with tight little knots, jotting like an artist in his account book.<sup>157</sup>

In less than twelve hours we have established the identity of a man literally blown to shreds, have found the organizer of the attempt, and have had a glimpse of the inciter behind him.<sup>158</sup>

In legal writing, these techniques can be used to great advantage to list elements of the analysis without relying on the crutch of numbering them. In concluding that a student organization on a college campus is a “public accommodation” for

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<sup>155</sup> NABOKOV, *supra* note 70, at 272.

<sup>156</sup> CATHER, *supra* note 141, at 40.

<sup>157</sup> BELLOW, *supra* note 31, at 137.

<sup>158</sup> CONRAD, *supra* note 72, at 189.

purposes of both federal and state civil rights laws, one might (after appropriately providing comparable facts from cases) write:

Our court will find the club to be a “public accommodation” under the statute if it engages in ‘broad public solicitation’ for new members, maintains a close relationship with a government agency or other public accommodation, and fails to meet the statutory exemption for reasonably restricting membership to a single sex.

Or one might list the evidence to which the legal rules will apply:

The club is a “public accommodation” because it solicits new members from the entire sophomore class, participates in a dining facility exchange program with other campus food service providers, accepts funding from the university for recreational programs, and has facilities that provide privacy for men and women.

While these examples may not be as poetic in rhythm as the first set of examples in this section, they do, at least, provide parallel sequences of unambiguous information in the kind of straightforward cadences illustrated in the latter two fiction excerpts.

### III. CONCLUSION

If the foregoing is not proof enough of the relationship between good legal writing and good writing in other realms, consider these rules from George Orwell’s well-known essay,

“Politics and the English Language.” In some form or another, they also appear in every legal writing textbook I cite in this article:

A scrupulous writer, in every sentence that he writes, will ask himself at least four questions, thus: What am I trying to say? What words will express it? What image or idiom will make it clearer? Is this image fresh enough to have an effect? And he will probably ask himself two more: Could I put it more shortly? Have I said anything that is avoidably ugly?

- i. Never use a metaphor, simile, or other figure of speech which you are used to seeing in print.
- ii. Never use a long word where a short one will do.
- iii. If it is possible to cut a word out, always cut it out.
- iv. Never use the passive where you can use the active.
- v. Never use a foreign phrase, a scientific word, or a jargon word if you can think of an everyday English equivalent.
- vi. Break any of these rules sooner than say anything outright barbarous.<sup>159</sup>

Orwell (a writer whose works, alas, did not appear frequently enough in my reading list research to warrant inclusion on my “great books” list) applied these principles to fiction as well as to his political commentaries. I believe they apply equally to legal analysis.

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<sup>159</sup> GEORGE ORWELL, *ESSAYS* 355, 359 (Penguin Classics ed. 2000) (1945).