

# The Lawyer's Struggle to Write

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*Writing is hard work. . . . If you find that writing is hard, it's because it is hard.* — William Zinsser<sup>1</sup>

A college senior who's completing her honors project on the topic of legal writing recently asked me to explain why so many lawyers struggle to write well.

At first, I was flattered. Then I thought that her project was too ambitious and that others could give her better advice. After all, legal-writing experts such as Bryan Garner, Joseph Kimble, and Ross Guberman have dedicated careers to diagnosing the causes of poor legal writing.

But I agreed to give my take on the subject for three reasons. First, as Irving Younger said, "Lawyers should acknowledge a professional obligation to wage war against bad writing."<sup>2</sup> Second, when people care about writing well (or, for that matter, care about doing anything well), they deserve to be encouraged. Third, it's about time I fess up about how my struggle to write well informs my views on why many lawyers don't.

## Who Needs This Nonsense?

I grew up hating English class. My parents, though well educated, didn't come from English or writing backgrounds, so I cared little about whether I could properly split infinitives or end sentences with prepositions or begin sentences with coordinating conjunctions. These topics just didn't come up during dinner chatter, and they certainly weren't the subject of intense

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<sup>1</sup> William Zinsser, *On Writing Well* 12 (6th ed. 1998).

<sup>2</sup> Irving Younger, *Symptoms of Bad Writing*, A.B.A. J., May 1986, at 113, 113.

discussion when my buddies and I cruised the town in our late-'70s clunkers. Besides, I was going to law school. And from what I could gather from watching TV, the typical day of a lawyer had nothing to do with English or writing — it was consumed with feisty court appearances, client meetings, cocktail parties, and the occasional extramarital fling.

My plan to avoid English coursework was tested during my senior year in high school. The college I planned to attend the next fall required English 101. But I dodged that obstacle by preemptively taking Introduction to English at the local state university.

Although I was a high-school student taking a college English class, my college-age classmates were even less interested than I was about being there. The instructor — a disheveled grad student sporting a scraggly half-beard — presented as a person who took *his* studies seriously. But he wasn't much of a teacher; I can't recall a single thing I learned in that class.

## **I'm Not That Good**

In college, I majored in political science and economics — i.e., prelaw. My writing skills mattered little to the economics professors — they cared only about the math. But my political-science professors were another story. I muddled through my first-year poli-sci courses with only a few literary bumps, mainly because they required multiple-choice exams.

But year two brought with it tougher classes and tougher professors. They required intense essay-writing. Then I couldn't hide it anymore: I faced the real world (where liberal-arts students had to write well to succeed), while trying to cling to my pretend world (where liberal-arts students could skate by with mediocre English skills). I finally admitted the truth: I wasn't much of a writer. I had to get better. Charitable professors helped me as much as they could. But I also knew that I had to start taking writing seriously.

## The Dead Hand of Legal Writing

Even though I got the writing bug in college, it was law school that fundamentally changed my approach to writing. There, like countless law students before me, I waded through casebooks filled with antiquated opinions, many of which were written so incomprehensibly that it took three or four reads just to understand the facts.

I soon realized that the moribund prose style of the early British and American jurists didn't jibe with a society that featured the Internet and 24-hours-a-day cable news. If you've spent two straight weeks analyzing *The Case of the Thorns* (K.B. 1466),<sup>3</sup> you know exactly what I mean.

For those of you who don't groan when you hear the name of that case, try to digest this circa-1681 reprise:

A man brought a writ of Trespass *quare vi et armis clausum fregit, & herban suam pedibus conculcando consumpsit* [Latin for *trampled and damaged the vegetation*] in five Acres. The Defendant pleads, that he hath an Acre lying next the said five Acres, and upon it a hedge of Thorns, and he cut the Thorns, and they, against his will, fell upon the Plaintiff's Land, and the Defendant took them off as soon as he could, which is the same Trespass; and the Plaintiff demurred; and adjudged for the Plaintiff; for though a Man doth a lawful Thing, yet if any damage do thereby befall another, he shall answer for it, if he could have avoided it. As if a Man lop a Tree, and the boughs fall upon another against his will yet an Action lies. If a Man shoot at the Butts, and hurt another unawares, an Action lies. I have Land through which a River runs to your Mill, and I lop the Sallows growing upon the Riverside, which accidentally stop the Water, so as your Mill is hindered, an Action lies. If I am Building my own house, and a Piece of Timber falls on my Neighbour's house and breaks Part of it, an Action lies. If a Man assault me, and I lift up my Staff to defend myself, and in lifting it up hit another, an Action lies by that Person, and yet I did a lawful Thing. And the Reason of all these Cases is because

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<sup>3</sup> *Hulle v. Orynge*, Y.B. 6 Edw. 4, fol. 7, pl. 18 (1466) (Eng.).

he that is damage ought to be recompensed. But otherwise it is in Criminal Cases, for there *actus non facit reum nisi mens sit rea* [Latin for *an act does not make one guilty unless there be a guilty mind*].<sup>4</sup>

True, this is an extreme example. But if I could barely understand this case and others like it, how could the average person? Did judges and lawyers even care whether nonlawyers could understand what filled these casebooks? My teachers assigned the old opinions without qualification, so I assumed that the answers to these questions were “They can’t” and “No.” In any event, I had no desire to spend my legal career emulating this long-dead prose.

After law school, I clerked for a state appellate court that required each clerk to write a weekly bench memorandum and to help (in varying degrees, depending on the judge) with opinion-drafting. For one year, I wrote and edited and cite-checked memos and opinions. Writing, rewriting, editing, and cite-checking became autonomic — like shooting free throws or washing your hair. The facts and law of each case would change; the form and structure of the bench memos and opinions didn’t.

My consistent writing workload as a law clerk also gave me certain insights about what works and doesn’t work in legal writing. I recognized what rhetorical techniques were effective and which ones came off as hollow or contrived. Most of all, I began to develop what John Trimble calls the writer’s sense, consisting of objectivity, empathy, and courtesy.<sup>5</sup> I began to understand that good legal writing is reader-centric, not writer-centric:

[The writer-centric writer] thinks through an idea only until it is passably clear to him, since, for his purposes, it needn’t be any clearer; he dispenses with transitions because it’s enough

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<sup>4</sup> *Bessey v. Olliot & Lambert*, T. Raym. 467 (1681) (Eng.) (summarizing *Hulle*), available at [http://lawweb.pace.edu/dld/torts\\_materials/case\\_of\\_the\\_thorns.pdf](http://lawweb.pace.edu/dld/torts_materials/case_of_the_thorns.pdf).

<sup>5</sup> John R. Trimble, *Writing with Style* 4 (3d ed. 2011).

that *he* knows how his ideas connect; he uses a private system — or no system — of punctuation; he doesn't trouble to define his terms because he understands perfectly well what he means by them; he writes page after page without bothering to vary his sentence structure; he leaves off page numbers and footnotes; he paragraphs only when the mood strikes him; he ends abruptly when he decides he's had enough; he neglects to proofread the final job because the writing is over . . . Given his total self-orientation, it's no wonder that he fails repeatedly as a writer. Actually, he's not writing at all; he's merely communing privately with himself — that is, he's simply putting thoughts down on paper.<sup>6</sup>

### Knowing That I Didn't Know — Again

After clerking, I joined the Club of Commercial Litigators. This is an odd club. It doesn't do much to screen its applicants, but in exchange all new members must assign their lives to the cause. Soon it was plain that I still didn't know how to write well. Or, to be more precise, I didn't know how to write at the level expected by the partners I worked for.

When I drafted letters to clients or opposing counsel, the partners would return them with more red ink than the original black. My brief-writing was slightly better, but the indictments didn't abate: "You write too much like a law clerk"; "You need to be more of an advocate"; "You cite too many cases for simple propositions." Etc., etc.

For the most part, I agreed with these criticisms, and I appreciated the partners' candor. I knew that I wasn't a *bad* writer. Because I had clerked for an appellate judge, I was probably above average for my experience level. I was, as Bryan Garner describes it, "consciously incompetent."<sup>7</sup> Or, to rip off Socrates,

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<sup>6</sup> *Id.* at 3 (ellipsis as in original).

<sup>7</sup> Bryan A. Garner, "The Third and Fourth Levels of Competence," in *Garner on Language and Writing* 24, 24–25 (2009).

I knew how much I still didn't know about writing.<sup>8</sup> I was comforted by the fact that at least I wasn't "unconsciously incompetent" — that is, I didn't indulge the delusion that my writing couldn't get any better.<sup>9</sup>

Speaking of Mr. Garner, about this time I took my first Garner legal-writing seminar — "Advanced Legal Writing & Editing." Mr. Garner often opens people's eyes about why their writing is so bad, and he has made it his life's work to spread the good news of good writing to the unbelievers.

Why write *Enclosed please find herein* when *Enclosed is* is shorter and simpler? Should you use *as to* in the middle of a sentence? No, *as to* is syntactically ambiguous — use *about* (preferably) or *regarding*. Genteelisms such as *prior to* and *subsequent to*? They're "puff words"<sup>10</sup> — use *before* and *after*. What about phrases such as *in accordance with* and *make an application for*? They're called *nominalizations*; good style requires substituting *according to* and *apply*. Why should writers hyphenate phrasal adjectives? Because a *violent-weather conference* isn't the same as a *violent weather conference*.<sup>11</sup> What about fancy words such as *utilize* and *individual*?<sup>12</sup> Nothing is lost by substituting *use* and *person*, and you sound less pretentious. (That lesson is lost in the airport warning "Do not accept items from unknown individuals.")

These are but a few of my early Garner gems.

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<sup>8</sup> Plato, "Apology," in *Five Great Dialogues* 38 (B. Jowett trans., Walter J. Black, Inc. 1942) (c. 360 B.C.E.) (describing Socrates' recounting of a chat with a politician: "he knows nothing, and thinks that he knows; I neither know nor think that I know").

<sup>9</sup> Garner, *Garner on Language and Writing* at 24.

<sup>10</sup> Law Prose, Inc., *David Foster Wallace on "Prior To,"* YouTube (Sept. 18, 2009), [https://www.youtube.com/watch?v=E\\_sQrxAorDo](https://www.youtube.com/watch?v=E_sQrxAorDo).

<sup>11</sup> Grammar Monkeys, Twitter (Oct. 5, 2012, 10:32 a.m. EST), <https://twitter.com/GrammarMonkeys/status/254242687543304193>.

<sup>12</sup> Theodore M. Bernstein, *The Careful Writer* 232 (1965) (calling the use of *individual* for *person* "either jocular (though only wearily so) or contemptuous").

Ultimately, brutal editing by my bosses, Mr. Garner's advice, and (most importantly) the passage of time morphed me into a "consciously competent" writer.<sup>13</sup> The basic technical and style problems that infected my early work faded away. At the risk of sounding insincere, it really was as simple as that.

### An Aside: Word Games

The funny thing about having a decent command of the English language, proper grammar, and good style is that it allows you to sniff out a distinct form of linguistic monkey business — the manipulation of language for social or political purposes. From time to time, for example, true believers on both ends of the political spectrum make up new terms to replace old terms when the old terms no longer suit their social or political agendas.

Let's examine the noun *illegal alien*, which is having a rough time of it lately. This term has traditionally referred to a foreign national who illegally enters the United States and doesn't leave.<sup>14</sup> The word *alien* has existed since at least 1350 and is derived from the Latin word *alius*, meaning "other" or "else."<sup>15</sup> The Oxford English Dictionary's first definition of *alien* is "[b]elonging to a foreign country or nation."<sup>16</sup>

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<sup>13</sup> Garner, *Garner on Language and Writing* at 25 (Consciously competent writers "trouble themselves to find out what respected authorities say about writing. They don't leave readily answerable questions unanswered.").

<sup>14</sup> See *Plyler v. Doe*, 457 U.S. 202, 205 (1982) (Brennan, J.) ("Unsanctioned entry into the United States is a crime . . ."); see also Bryan A. Garner, *Garner's Modern American Usage* 830 (3d ed. 2009) (the term *illegal alien* "is not an opprobrious epithet: it describes one who is present in a country in violation of the immigration laws (hence 'illegal')").

<sup>15</sup> Careen Shannon, *Stop Calling People "Aliens,"* Salon, May 27, 2013, [http://www.salon.com/2013/05/27/stop\\_calling\\_people\\_alien/](http://www.salon.com/2013/05/27/stop_calling_people_alien/).

<sup>16</sup> Oxford Dictionaries, [http://www.oxforddictionaries.com/us/definition/american\\_english/alien](http://www.oxforddictionaries.com/us/definition/american_english/alien) (last visited Mar. 11, 2015).

But there's more. The term *illegal alien* is also firmly embedded in U.S. law. The U.S. Code contains 14 instances of the term, and the Code of Federal Regulations contains another 10.<sup>17</sup> The U.S. Supreme Court has used *illegal alien* in 57 opinions, including its 2012 decision in *Arizona v. United States*.<sup>18</sup> So *illegal alien* has going for it both history and well-documented, generally accepted use.

Yet some self-appointed language regulators — including *USA Today*, the *Associated Press*, *The New York Times*, the *Los Angeles Times*, and *The Denver Post* — now decree that writers who wish to remain members of polite society must not use *illegal alien*. Instead, each paper now recommends its own custom replacements.<sup>19</sup>

The point of these word-change movements, of course, isn't to update archaisms — antiquated words or phrases whose days are long past. Most people know what *illegal alien* means. The

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<sup>17</sup> Cornell Univ. Law Sch. Legal Info. Inst., <http://www.law.cornell.edu/search/site/%22illegal%20alien%22> (last visited Mar. 11, 2015) (search for “illegal alien”).

<sup>18</sup> \_\_\_ U.S. \_\_\_, 132 S. Ct. 2492 (2012).

<sup>19</sup> Dylan Byers, *USA Today Revises “Illegal Immigrant” Use*, Politico, Apr. 11, 2013, <http://www.politico.com/blogs/media/2013/04/usa-today-revises-illegal-immigrant-use-161421.html> (preferring *undocumented immigrant*, *undocumented worker* or *unauthorized immigrant*); Paul Colford, “*Illegal Immigrant*” No More, Associated Press, Apr. 2, 2013, <http://blog.ap.org/2013/04/02/illegal-immigrant-no-more/> (banning “*illegal alien*, *an illegal*, *illegals* or *undocumented*”); Rebecca Shapiro, *NY Times Tweaks Entry on “Illegal Immigrant,”* Huffington Post, Apr. 23, 2013, [http://www.huffingtonpost.com/2013/04/23/ny-times-illegal-immigrant\\_n\\_3141724.html](http://www.huffingtonpost.com/2013/04/23/ny-times-illegal-immigrant_n_3141724.html) (prohibiting “*illegal* as a noun” and “the sinister-sounding *alien*”); The Times’ Style: “*Illegal Immigrant*” or “*Undocumented Immigrant*,” Not “*Illegal Alien*,” Los Angeles Times, Sept. 3, 2011, at 27, available at <http://articles.latimes.com/2011/sep/03/opinion/la-le-post-cript-20110903> (preferring *illegal immigrant* or *undocumented immigrant*); Greg Moore, *Why The Denver Post Is Dropping the Term “Illegal Immigrant,” Except in Essential Quotes*, The Denver Post, May 2, 2013, <http://blogs.denverpost.com/editors/2013/05/02/denver-post-style-illegal-immigrant/976/> (banning *illegal alien*, *an illegal*, *illegals*, *illegal immigrant*, *undocumented alien*, and *undocumented worker*, and recommending persons “living in or entering a country illegally or without legal permission”).

motivation behind these word games is to change the connotation accompanying the old term to change the political narrative associated with the term. Compared to *illegal alien*, for example, the term *undocumented worker* conjures the image of Joe Six-Pack who forgets to bring his social-security card on his first day of work, thus preventing his employer from setting up automatic paycheck deposit.

Besides the reader confusion that results when the media use different terms to describe the same thing, the problem with trying to change by top-down fiat society's attitude toward a group of people or particular social cause is that people recognize the artifice and don't particularly appreciate it. Author David Foster Wallace — hardly a political conservative — made this point in *Authority and American Usage* when discussing the irony of Politically Correct English:

There's a grosser irony about Politically Correct English. This is that PCE purports to be the dialect of progressive reform but is in fact — in its Orwellian substitution of the euphemisms of social equality for social equality itself — of vastly more help to conservatives and the US status quo than traditional SNOOT prescriptions ever were. . . . As a practical matter, I strongly doubt whether a guy who has four small kids and makes \$12,000 a year feels more empowered or less ill-used by a society that carefully refers to him as "economically disadvantaged" rather than "poor." Were I he, in fact, I'd probably find the PCE term insulting — not just because it's patronizing (which it is) but because it's hypocritical and self-serving in a way that oft-patronized people tend to have really good subliminal antennae for.<sup>20</sup>

So, too, with the trickle-down movement to change *illegal alien* to *undocumented immigrant* or *unauthorized immigrant*

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<sup>20</sup> David Foster Wallace, "Authority and American Usage," in *Consider the Lobster* 66, 111–12 (2006).

or *undocumented worker* or *irregular migrant* (the EU's term<sup>21</sup>) or some other vague, watered-down term. I doubt that a person who knowingly violated U.S. law by illegally crossing the border takes much comfort in the consolation prize of a terminology change in *The New York Times* when the chances are close to nil that Congress will change his or her immigration status anytime soon.

But there's a larger point for lawyers here. Legal writers' success, like the success of any popular brand, depends on maintaining credibility and trust. If lawyers start playing games with words, they risk losing credibility with their readers — their bosses, their clients, and the judges they appear before. Irving Younger — perhaps recalling Lara in *Doctor Zhivago*<sup>22</sup> — understood this:

Lawyers and judges should call things by their right name[s] and state the real reasons for what they do. Only then will it be possible to engage in intelligent analysis and criticism, exposing and correcting error, eliminating irrationality, and transmitting to our successors a body of law better and more coherent than the one we inherited. Yet many of us have fallen into a habit that dishonors candor. Things are not called by their right name[s] but by elaborate wrong names. Decisions are not explained as what they are but as something else, easier and always more complicated than the truth.<sup>23</sup>

Playing games with words isn't a good idea. This rule applies whether you're a journalist or a lawyer or a teacher or a poli-

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<sup>21</sup> Resolution 1509 (2006), Eur. Parl. Assemb. Deb. 18th Sess. (June 27, 2006), available at <http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta06/eres1509.htm>.

<sup>22</sup> See Boris Pasternak, *Doctor Zhivago* 75 (Pantheon 1958) (describing how, as Lara walked in a field, she rediscovered “the purpose of her life. She was here on earth to grasp the meaning of its wild enchantment and to call each thing by its right name . . .”).

<sup>23</sup> Irving Younger, *In Praise of Simplicity*, 62 A.B.A. J. 632, 632 (1976).

tician or a mechanic or a shoe seller. Call things by their right names. Your credibility depends on it.

So back to the main topic of this essay: why do many lawyers write so poorly? The reasons are several.

### **Kids Don't Learn the Fundamentals**

Some law students who begin law school as poor writers don't improve their writing in law school or later as lawyers. Some blame for lawyers' poor writing skills must be laid at the feet of 40-plus years of the educational community's emphasizing creative, emotive literary expression to the subordination of technical skills.

Many college students get a rude awakening when they get their first job and their bosses expect them to communicate effectively. In *Why Johnny Can't Write, and Why Employers Are Mad*, Kelley Holland points to a 2013 survey of 318 employers conducted by Hart Research Associates for the Association of American Colleges and Universities. Of the employers surveyed, 80% said that colleges and universities need to focus more on written and oral communication. Holland also cites *The Nation's Report Card: Writing 2011*, published by the U.S. Department of Education. That report found that only 24% of 8th and 12th graders were proficient writers.<sup>24</sup>

William Ellet, an adjunct writing professor at Brandeis International Business School, summarizes the DOE report as follows: "nobody takes responsibility for writing instruction."<sup>25</sup>

What's sad about the failure of U.S. high schools and colleges and universities to teach the fundamentals is that their neglect has the biggest effect on inner-city high-school students, whose lack of basic writing skills compounds other challenges.

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<sup>24</sup> Kelley Holland, *Why Johnny Can't Write, and Why Employers Are Mad*, CNBC (Nov. 11, 2013, 6:00 a.m. ET), <http://www.cnbc.com/id/101176249>.

<sup>25</sup> *Id.*

No wonder, then, that some forward-thinking high schools now make study of English and expository writing the main focus of their coursework. New Dorp High School in Staten Island, New York, is one of those schools.

In 2012, *The Atlantic* reported on a writing revolution taking place at New Dorp.<sup>26</sup> In 2006, 82% of New Dorp freshmen read below their grade level. A year later, New Dorp administrators found that only 40% of incoming students graduated. New Dorp was one of the country's 2,000 worst-performing high schools. By any measure, New Dorp was a failed high school.

But in 2008, New Dorp's principal and faculty members diagnosed the problem: New Dorp students couldn't write. So the school adopted an intense writing program meant to "reverse a pedagogical pendulum that ha[d] swung too far, favoring self-expression and emotion over lucid communication."<sup>27</sup> New Dorp's writing program — a writing-centric teaching method created by Dr. Judith C. Hochman — didn't invent anything new; it simply revisited the fundamentals of effective communication.

The results stunned administrators, teachers, and students alike. By their sophomore year, students who had begun the writing program as freshmen started scoring higher on exams than any previous class. Pass rates for state-required tests increased across the board. By 2012, the school's graduation rate had increased from 63% to 80%.<sup>28</sup>

The author of *The Atlantic* article concluded that reverting instructional focus to the fundamentals caused the success:

[New Dorp's] success suggests that perhaps certain instructional fundamentals — fundamentals that schools have devalued or

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<sup>26</sup> Peg Tyre, *The Writing Revolution*, *The Atlantic*, Oct. 2012, at 96, available at <http://www.theatlantic.com/magazine/archive/2012/1/the-writing-revolution/309090/>.

<sup>27</sup> *Id.* at 98.

<sup>28</sup> *Id.*

forgotten — need to be rediscovered, updated, and reintroduced. And if that can be done correctly, traditional instruction delivered by the teachers already in classrooms may turn out to be the most powerful lever we have for improving school performance after all.<sup>29</sup>

If you don't believe me, listen to New Dorp's students. They're confident, empowered, and hopeful about their futures — all because they've learned the fundamentals of writing.<sup>30</sup>

But despite the recent reversion to emphasizing fundamental writing skills in some high schools and colleges, society can't turn the clock back on the decades-long deterioration in those skills. Some students who grew up under the prior regime are lawyers, so it's no stretch to say that this systemic problem has contributed to lawyers' poor writing.

### **The Casebook Method Doesn't Help**

If the failure of high schools and colleges to teach fundamental writing skills is partly to blame for poor legal writing, the casebook method of law-school instruction doesn't help either.

In the United States' infancy, aspiring lawyers first received legal instruction through apprenticeships, then from oral lectures, and then from reading textbooks of the oral lectures.<sup>31</sup> But in the late 19th century, Harvard Professor Christopher Columbus Langdell created the casebook method that most law schools still use.<sup>32</sup> The casebook method is a dialectical method of learning in which, instead of being “committed to rigid boundaries of

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<sup>29</sup> *Id.* at 101.

<sup>30</sup> A. Passalacqua, *The Writing Code*, YouTube (May 11, 2013), <https://www.youtube.com/watch?v=l8Q5MaqO5Ig>.

<sup>31</sup> Arthur D. Austin, *Is the Casebook Method Obsolete?*, 6 *Wm. & Mary L. Rev.* 157, 158–61 (1965).

<sup>32</sup> Harvard Law School, *The Case Studies: The Case Study Teaching Method*, <http://casestudies.law.harvard.edu/the-case-study-teaching-method/>.

memorization, the student relies on a general reasoning pattern (empirical classification) that can be applied to any problem.”<sup>33</sup>

Many old opinions are written in the Asiatic or grand style.<sup>34</sup> As Bryan Garner explains, it is “a florid oratorical style [that] sports elaborate antitheses, complicated syntax, and correspondences in sense and sound.”<sup>35</sup> Supreme Court Justice Benjamin Cardozo, for example, wrote in the Asiatic style. But the Asiatic style is difficult to learn and even more difficult to master. So when lawyers with average writing skills try to emulate it, they don’t end up writing like Justice Cardozo; instead, they write in a “bastardized Asiatic style”<sup>36</sup> typified by legal jargon and sprawling, dense prose.<sup>37</sup>

Two reforms could help mitigate the casebook method’s undesirable effects.

First, as Calvin Coolidge observed, “If we wish to erect new structures, we must have a definite knowledge of the old foundations.”<sup>38</sup> Law students must, of course, learn about legal history and understand fundamental legal principles. So reading and dissecting the old cases should continue to be part of law-school instruction.

But learning about legal history and the basic principles of U.S. law doesn’t mean that law students need to be inundated

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<sup>33</sup> Austin, 6 Wm. & Mary L. Rev. at 162.

<sup>34</sup> Matthew R. Salzwedel, *Use 5-Cent Words for 10-Dollar Ideas*, Minn. Law., Apr. 1, 2013, at 7, available at <http://legalwritingeditor.com/files/2013/04/Use-five-cent-words-for-ten-dollar-ideas-Minn.-Lawyer-4-1-13.pdf>; Matthew R. Salzwedel, *Simple Legal Writing a Newfangled Idea? Hardly*, Lawyerist (Nov. 14, 2012), <http://lawyerist.com/51594/simple-legal-writing-a-newfangled-idea-hardly/>.

<sup>35</sup> Bryan A. Garner, *The Elements of Legal Style* 6 (2d ed. 2002).

<sup>36</sup> *Id.*

<sup>37</sup> See generally Joseph Kimble & F. Georgann Wing, *Protecting Your Writing from Law School: An Open Letter to Law Students*, 65 Mich. B.J. 576, 576 (1986) (“Law school brings with it a daily diet of appellate court opinions to read. Unless you guard against their corrupting influence, your writing may turn fat and flabby, clogged and lifeless, like the opinions themselves.”).

<sup>38</sup> Calvin Coolidge, Inaugural Address (Mar. 24, 1925), available at <http://www.presidency.ucsb.edu/ws/?pid=25834>.

for entire semesters with antiquated, convoluted opinions that have little relevance to current law. One important reform, then, would be to update the casebooks to include newer opinions written by the master legal writers of today, such as Chief Justice Roberts, Justice Kagan, and judges Diane Wood, Richard Posner, Neil Gorsuch, and Frank Easterbrook.

Second, law-school professors should begin qualifying their assignments of the old cases by saying something like this: “I’m assigning these cases to you because you need to understand legal history and the basic principles of U.S. law. But neither I nor your future employers or clients will want you to emulate their writing style.”

Many law schools’ legal-writing programs explain this distinction to students, but law professors who teach the principal subjects must reinforce it. The message to law students must be unequivocal and unified: understand the historical context of the old cases, but model your writing style to fit these times.

### **Inertia Dies Hard**

Another cause of poor legal writing is inertia. Many documents floating around law firms and legal departments were written decades ago in the traditional style.<sup>39</sup> That’s why lawyers encounter court papers that begin with *Now comes the plaintiff* or contracts that begin with traditional *Whereas* clauses. If a new lawyer joins a firm or legal department that uses old forms as templates, he or she fears deviating from them. Even if the

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<sup>39</sup> Bryan A. Garner, “Finding Good Models of Writing,” in *Garner on Language and Writing* 21, 22 (2009) (“[L]ooking in files in a law office is likely to turn up nothing but mediocrities — documents with a fair amount of credibility-destroying legalese, slow windups, slow deliveries, confusing factual statements, weak analyses, and rote conclusions. I know this because I see these documents week in and week out in law firms and legal departments all across the nation.”).

new lawyer wants to trash the old forms and start anew, it's a reasonable course not to make your first job a suicide mission.<sup>40</sup>

But years pass and the lawyer, still using the old forms, makes partner or is promoted to general counsel. The plain-English training from law school is a distant memory. It no longer matters whether clients or business units can understand the complex jargon. Now he or she can. And guess what happens? The old forms get passed to newer lawyers, and the cycle repeats.<sup>41</sup>

For a new lawyer who learns about plain English in law school and wants to apply it in practice, this is an unpleasant dilemma. Wayne Schiess says, “[D]on’t take a stand at the expense of your job or your relationship with your boss,” but “when you have control over the documents, write them the way you want to.”<sup>42</sup> Joseph Kimble advises new lawyers who face this dilemma to “either try gentle persuasion or wincingly do what your boss wants, bide your time until you can decide, and know that your boss’s attitude and style are retrograde.”<sup>43</sup> I’ve recommended pretty much the same thing, unless your boss is about to make an obvious punctuation or grammar error. What value

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<sup>40</sup> Wayne Schiess, *When Your Boss Wants It the Old Way*, 80 Mich. B.J., June 2001, at 68, 68 (“No lawyer wants to be the one who ‘updated’ the standard form and fouled it up . . . . Especially for a younger lawyer who is just learning about litigation, it just feels too risky, both for legal practice and for job security, to start changing the old forms the boss has been using.”).

<sup>41</sup> See Peter M. Tiersma, *Legal Language* 217 (1999) (“Unfortunately, after students graduate they often go to work for members of the profession who grew up in the old school and are forced to imitate their antiquated style.”); Ken Bresler, *Pursuant to Partners’ Directive, I Learned to Obfuscate*, 79 Mich. B.J. 1686, 1686 (2000) (“[W]hen I became an associate in a law firm, my writing style — clean, brisk, and straightforward — exasperated the other lawyers. I just didn’t sound like one of them.”).

<sup>42</sup> Schiess, 80 Mich. B.J. at 68.

<sup>43</sup> Joseph Kimble, *You Think Anybody Likes Legalese?*, 92 Mich. B.J., Aug. 2013, at 52, 53.

does a new lawyer add if she can't muster the courage to spare her boss professional embarrassment?<sup>44</sup>

Lawyers who care about writing well must exploit opportunities to break their bosses' zombie-like infatuation with the old forms. These opportunities do occur. Perhaps the law has changed and the old forms need to be updated to reflect the change. When updating the forms, why not take the opportunity to rewrite them in plain English? Before doing so, ask clients or business units to tell you what they like and dislike about the old forms. Invariably, they will tell you to ditch the legalese and make the prose shorter and simpler. If your boss objects to the plain-English revisions, you can cite this feedback as further support for the changes. If you structure a rewriting project this way, it's far more likely that you'll be commended for your initiative rather than be called out for exceeding the original scope of the project.

### **Making Sausage Is No Recipe for Success**

As William Zinsser teaches, "A clear sentence is no accident. Very few sentences come out right the first time, or even the third time. Remember this in moments of despair."<sup>45</sup>

Rewriting is the most important stage in a writing project, but it's the stage that lawyers too often neglect.<sup>46</sup> Perhaps lawyers don't have time to rewrite their work. Perhaps they think their clients won't pay for it. Perhaps they assume that their clients won't distinguish the good work product from the bad. Perhaps they think that judges won't care if they file a passably

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<sup>44</sup> Matthew R. Salzwedel, *Exacting Legal Writers Sweat the Small Stuff*, Legal Writing Editor (Feb. 11, 2013), <http://legalwritingeditor.com/2013/02/11/exacting-legal-writers-sweat-the-small-stuff/> ("[B]y aiding and abetting superiors' punctuation and grammar blunders, everyone involved is made a fool.").

<sup>45</sup> Zinsser, *On Writing Well* at 12.

<sup>46</sup> *Id.* at 4 ("[P]rofessional writers rewrite their sentences over and over and then rewrite what they have rewritten.").

literate first or second draft (even though judges do<sup>47</sup>). Perhaps they just don't care. Perhaps it's a combination of some or all of these reasons. Whatever the cause for the individual lawyer, it seems that no reform can solve this problem.

Writing well takes time and tests lawyers' mental, emotional, and physical stamina. Either you plan ahead and give yourself enough time to complete a writing project, or you don't. Either you occasionally stay up until 3 a.m. to finish rewriting a brief, or you don't. Some lawyers choose to do these things; some don't.

You can't reform a lawyer who isn't interested in doing these things. But like proofreading work before submitting it, allocating time to rewriting is within any writer's control.

## The Allure of Pomposity

Finally, many lawyers don't write well because they quite enjoy writing "like a lawyer." They rationalize their egocentric view of legal writing in part by falsely claiming that their clients expect it.

Let's start with the lower-hanging fruit — the false witness that clients expect lawyers to write "like a lawyer." This claim is false because there isn't a shred of empirical evidence that supports it. What the evidence does show is that consumers say time and time again that they hate dense, jargon-filled legal writing, whether it takes the form of a government document, product-information sheet, investment prospectus, insurance policy, or consumer-credit contract.<sup>48</sup>

As Joseph Kimble has pointed out (also time and time again), "no fewer than 25 studies show that readers of all kinds — judges,

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<sup>47</sup> See Bryan A. Garner, *Judges on Effective Writing: The Importance of Plain Language*, 84 Mich. B.J., Feb. 2005, at 44, 44–45 (quoting 20 judges).

<sup>48</sup> See Joseph Kimble, *Writing for Dollars, Writing to Please* 23–25 (2012) (citing four consumer surveys).

lawyers, clients, consumers — strongly prefer plain language to the old style, understand it better and faster, are much more likely to comply with it, and are much more likely to read it in the first place.”<sup>49</sup> No study or consumer survey contradicts this evidence.

As for the lawyers who take pride in writing “like a lawyer,” this problem has defined the legal profession since at least the mid-13th century.<sup>50</sup> Many lawyers like to write in the traditional style because, well, it’s what sets them apart from the commoners.<sup>51</sup> Think about this not-so-implausible hypothetical:

You’re a lawyer who has just spent three years in law school racking up a massive amount of student-loan debt. Your job prospects are few, so you’re forced to accept a temp job at an employment agency reviewing discovery documents for a mass-tort case. Finally, after a year of getting paid \$20 per hour reviewing mostly useless documents and going further into debt, you get your first real job. You begin to interact with the firm’s clients. They find you impressive — the nice suit, tie, shoes, cuff links, and pressed shirt. They also find you impressive because you communicate with them in a foreign language — the language of the law. Because you know this foreign language and they don’t, you hold the keys to their future — whether it’s keeping them out of jail or bankruptcy or a messy divorce.

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<sup>49</sup> Joseph Kimble, *Wrong — Again — About Plain Language*, 92 Mich. B.J., July 2013, at 44, 47 (citing the summaries in *Writing for Dollars*, *Writing to Please* at 134–66).

<sup>50</sup> Matthew R. Salzwedel, *Plain-English Style Transcends Ideology*, Minn. Law., June 3, 2013, at 5, available at <http://legalwritingeditor.com/files/2013/05/Plain-English-style-transcends-ideology.pdf>. For a thorough treatment of this point, see generally David Mellinkoff, *The Language of the Law* 95–135 (1963) (discussing the rise and fall of law French).

<sup>51</sup> See George H. Hathaway, *The Plain English Movement in the Law — Past, Present and Future*, 64 Mich. B.J. 1236, 1237 (1985) (Lawyers “have gotten used to legalese. Using legalese subconsciously makes them feel worthwhile. They didn’t go to the most prestigious law school in the entire solar system to come out writing like everyone else. They didn’t take the bar examination three times just so they could write like everyone else. To eliminate legalese would deprive them of their lawyerinity.”).

What, they openly ask, would they do without your help? That makes you feel good. You congratulate yourself — you’ve come a long way since that miserable document review.

Now, don’t get me wrong: there’s nothing objectionable about this hypothetical lawyer. The many, sometimes conflicting emotions — fear, self-consciousness, and self-satisfaction — are unremarkably human. But this lawyer is forgetting what many practicing lawyers seem to forget: their professional obligation is not to assuage their real or perceived fears or bolster their deflated egos, but to serve clients.

It’s this point that many lawyers don’t get: clients’ interests are never served by communicating with them or on their behalf in a way that makes the lawyer feel good but makes the clients — or the people who hold the clients’ future in their hands — feel stupid. As Steven Pinker says in *The Sense of Style*, “Classic writing, with its assumption of equality between writer and reader, makes the reader feel like a genius. Bad writing makes the reader feel like a dunce.”<sup>52</sup>

Good lawyers know that they need not fear informed, empowered clients. Communicating with clients in a language they understand isn’t a weakness; it’s a strength. It shows that the lawyer is serving the client’s needs, not her own. The sooner lawyers understand and accept that they aren’t special and start to treat their clients accordingly, the sooner the legal profession will ensure its lasting future.

## **You Can’t Fix What You Won’t Face**

Legalese persists for the same reasons as always — habit, inertia, form books, fear of change, and notions of prestige. These reasons are more emotional than intellectual. We may think

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<sup>52</sup> Steven Pinker, *The Sense of Style: The Thinking Person’s Guide to Writing in the 21st Century* 36 (2014).

that clients expect and pay for legalese, but really, legalese has long been a source of ridicule. And besides, since legalese has nothing of substance to recommend it, its prestige value depends on ignorance. We cannot fool people forever. Our main goal should be to communicate, not to impress.<sup>53</sup>

Joseph Kimble wrote this passage 25 years ago in the *Michigan Bar Journal*. Since then, has that much really changed in the legal profession?

In college I had to face the real world (where successful pre-law students needed to know how to write well) while trying to cling to my pretend world (where I could skate by with mediocre writing). I had to face another set of harsh realities when I began practicing litigation. But law schools and the bar have been quite good at maintaining their pretend world. The legal profession has succeeded in minimizing, rationalizing, and explaining away its poor legal writing even though many of the causes — inundating law students with centuries-old, poorly written opinions; inertia; not dedicating time for rewriting; and the allure of pomposity — are well within its control.

Pulitzer Prize-winning historian Barbara Tuchman reportedly observed that “telling the truth about a given condition is absolutely requisite to any possibility of reforming it.”<sup>54</sup> But this plain-English version is perhaps better: “As my pastor . . . says, ‘You can’t fix what you won’t face.’”<sup>55</sup>

When will the legal profession face what the rest of the world has been telling it for more than 600 years? When will lawyers begin to focus on their clients’ needs instead of their own? When will good legal writing become the norm, not the infrequent exception? Your guess is as good as mine.

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<sup>53</sup> Joseph Kimble & Joseph A. Prokop, Jr., *Strike Three for Legalese*, 69 Mich. B.J. 418, 421 (1990).

<sup>54</sup> Wilford S. Bailey & Taylor D. Littleton, *Athletics and Academe: An Anatomy of Abuses and a Prescription for Reform* 137 (1991).

<sup>55</sup> Betty Winston Baye, Editorial, *Inequalities Are to Blame, Not White Folks*, Des Moines Register, Apr. 6, 2002, at 11A.

What I do know is that lawyers, like advertising executives or politicians or tellers at the local McDonald's, don't create or build anything tangible. Their livelihood depends on other people's listening to them and paying their bills. At some point, the people who pay the bills will have had enough of the excuses for the gibberish, jargon, obfuscation, and prolixity in legal language. They will demand lawyers who can write in their mother tongue.

That day will come. We cannot fool people forever.