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A Lawyer's Hidden Persuader: Genre Bias and How It Shapes Legal Texts By Constraining Writer's Choices And Influencing Readers' Perceptions

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A LAWYER'S HIDDEN PERSUADER: GENRE BIAS AND HOW IT SHAPES LEGAL TEXTS BY CONSTRAINING WRITERS' CHOICES AND INFLUENCING READERS' PERCEPTIONS

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Shapes of knowledge are always ineluctably local, indivisible from their instruments and encasements.[1]

I. INTRODUCTION

Instruments of knowledge are what we call "texts," and the *encasements* for those texts are what are called "genres." Genres

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[1] CLIFFORD GEERTZ, LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 4 (1983); *see also* CLIFFORD GEERTZ, *Blurred Genres: The Refiguration of Social Thought*, *in* LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 19 (1983) (exploring the effect of genres in the humanities on sociological understanding).

are a cognitive process of classification that channel thinking and thereby influence individuals' communicative actions.[2] Genres are also central to human communication, understanding, and persuasion.[3] It is "impossible to . . . dwell in the social world without repertoires of typified social responses in recurrent situations"[4] and therefore, we rely on genres to shape our writing and speech and to make each of them "a recognizable response to the exigencies of the situation."[5] In this way, genre is "a situated form of cognition"[6]—and thus a powerful bias.[7]

What this article titles "genre bias" is a cognitive short cut that allows us to more quickly process and better understand text. While such biases can affect our approach and interpretation of a text; the genre bias can also reinforce our sense of self by fulfilling expectations. In many ways, this is one reason why we find fiction compelling, news informative, and jokes funny.

A simple test demonstrates the power of the genre bias—genre's power to skew one's approach to and interpretation of a text (a bias). Assume the following paragraph comes from a novel entitled *Murder at Marplethorpe*:

> The clock on the mantelpiece said ten thirty, but

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[2] *See* Joanne Yates & Wanda J. Orlikowski, *Genres of Organizational Communication: A Structural Approach to Studying Communication and Media*, 17 ACAD. MGMT. REV. 299, 300–02 (1992); *see also* Michael Sinding, *After Definitions: Genre, Categories, and Cognitive Science*, 35 GENRE 181, 193 (2002) [hereinafter Sinding, *After Definitions*] ("Genre knowledge is not specialist understanding, but rather functional or interactive capacity . . . to recognize new as well as existing members of the genre by their own features, to understand conventions and how to respond to them.").

[3] *See* Sinding, *After Definitions*, *supra* note 2, at 181–82, 213–14.

[4] The terms "recurrent" situation and "recurring" situation are used interchangeably in this article.

[5] Carol Berkenkotter & Thomas N. Huckin, *Rethinking Genre from a Sociocognitive Perspective*, 10 WRITTEN COMM. 475, 482 (1993) [hereinafter Berkenkotter & Huckin, *Rethinking Genre*].

[6] ANNA TROSBORG, ANALYSING PROFESSIONAL GENRES viii (2000); *see also* CAROL BERKENKOTTER & THOMAS N. HUCKIN, GENRE KNOWLEDGE IN DISCIPLINARY COMMUNICATION: COGNITION/CULTURE/POWER 3 (1995) (asserting that genre knowledge is "a form of situated cognition").

[7] William J. Clancy, *Situated Action: A Neuropsychological Interpretation Response to Vera and Simon*, 17 COGNITIVE SCI. 87, 95 (1983).

> someone had suggested recently that the clock was wrong. As the figure of the dead woman lay on the bed in the front room, a no less silent figure glided rapidly from the house. The only sounds to be heard were the ticking of that clock and the loud wailing of an infant.[8]

Now read it again, and assume the title is *The Personal History of David Marplethorpe*.[9] The difference is palpable.

In this famous example of the power of genre to channel the reader's understanding of a text, English professor Heather Dubrow asks readers to consider how the meaning of the text changes based on the assigned genre.[10] As a piece of detective fiction, "the inaccuracy of the clock and the fact that the woman lies dead in the front room become important clues [and] the figure gliding away assumes a particular subject role within the discourse, the subject role of suspect."[11] As a coming-of-age autobiography, the reader places a "different significance on the dead body or the fact that the clock is inaccurate."[12] Certainly, in such a novel we will be less likely to look for a suspect. That is, we will not be reading with "detective eyes" as we would if we were reading detective fiction. As Dubrow suggests, in a coming-of-age autobiography the crying baby will become more central to the meaning and even become the very David Marplethorpe whose story is being told.[13]

While literature is often thought of as synonymous with genre generally, you would be hard pressed find a profession more immersed in this normative force of genre bias than the field of

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[8] HEATHER DUBROW, GENRE 1 (1982).

[9] *Id.*

[10] *Id.* at 3. This can go on and on with alternative titles as college English teachers seek to help their students understand genre. For example, what if the title were "The Vampire of Marplethorpe" or "Marplethorpe Home Security?" *See* Melanie Kill, *Thinking About Genre*, UNIV. OF WASH. (2007), *available at* http://courses.washington.edu/webrhet/bis384/documents/thinkingaboutgenre.pdf.

[11] Anis Bawarshi, *The Genre Function*, 62 C. ENG. 335, 342 (2000).

[12] *Id.*

[13] *Id.*

law.[14] Thus it would seem natural that a complete understanding of legal writing—including how and why it works—is achieved only with an appreciation of *genre bias*, a new phrase for an innate phenomenon. Genre bias, as a central part of genre, must be appreciated by lawyers and judges because "understanding the genres of written communication in one's field is . . . essential to professional success."[15] Yet, remarkably, genre bias remains largely unexplored by legal writing instructors and entirely unappreciated by practicing lawyers. This Article aims to change that.

Practitioners of the law are varied. They include leasing lawyers, transactional lawyers, patent lawyers, criminal lawyers, appellate lawyers, trial lawyers, immigration lawyers, environmental lawyers, law professors, criminal judges, divorce judges, and so on. Each practitioner thinks *like a lawyer*,[16] and

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[14] *See* Karen Petroski, *Statutory Genres: Substance, Procedure, Jurisdiction*, 44 LOY. U. CHI. L.J. 189, 252 (2012) ("Legal theory and doctrine have long explored the normative force of particular instances of communication, as well as particular instances of categorization. Many (though not all) such questions are internalized in legal training and addressed in doctrine. The legally trained intuitively, if not explicitly, understand that particular instances of classification gain their normative force as a result of processes similar to those described by genre theorists. Some individuals and institutions—such as legislators, law revision committees, legal publishers, judges, and treatise authors—are accorded authority, by social practice and other institutional mechanisms, to make classifications that others will treat as having normative force.") (citation omitted).

[15] TROSBORG, *supra* note 6, at vii.

[16] ELIZABETH MERTZ, THE LANGUAGE OF LAW SCHOOL: LEARNING TO THINK LIKE A LAWYER (2007); *see also* Christoph A. Hafner, *A Multi-Perspective Genre Analysis of the Barrister's Opinion: Writing Context, Generic Structure, and Textualization*, 27 WRITTEN COMM. 411, 413 (2010) ("Legal reasoning, frequently referred to as 'thinking like a lawyer' can be conceived of as a form of rule-based reasoning, in which abstract principles of law are applied to given factual situations, in order to determine the rights and duties of the parties to a dispute."). Some call this idea of "thinking like a lawyer" a broad type of genre—a meta-genre. *See* Vijay K. Bhatia, *Legal Genres*, *in* 7 ENCYCLOPEDIA OF LANGUAGES & LINGUISTICS 1, 1–2 (Keith Brown et al. eds., 2d ed. 2006) [hereinafter Bhatia, *Legal Genres*]; *see also* Janet Giltrow, *Meta-Genre*, *in* THE RHETORIC AND IDEOLOGY OF GENRE: STRATEGIES FOR STABILITY AND CHANGE 187, 195 (Richard M. Coe et al. eds., 2002) ("[M]eta-genres are the atmospheres of wordings and activities, demonstrated

while this mindset guides how lawyers view problems and facts, each practice area has its own generic code[17] which functions as a kind of doorway permitting entry to a room that only those who know and use the code can meaningfully access. These genres, as well as the broader notion of *thinking like a lawyer*, function both collectively and independently to guide and constrain the texts that lawyers and judges use in specific circumstances[18] and become engrained in the practitioner's mind.[19]

We humans are *homo categorius*. Our brains categorize things, events, books, memories, socks, stocks, rocks, people, photos, and just about everything we do, or are, or interact with.[20] While not

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precedents or sequestered expectations—atmospheres surrounding genres.").

[17] *See, e.g.*, VIJAY K. BHATIA, ANALYSING GENRE: LANGUAGE USE IN PROFESSIONAL SETTINGS (1993) [hereinafter BHATIA, ANALYSING GENRE]; JOHN GIBBONS, FORENSIC LINGUISTICS: AN INTRODUCTION TO LANGUAGE IN THE JUSTICE SYSTEM (2003); DAVID MELLINKOFF, THE LANGUAGE OF THE LAW (2004); PETER TIERSMA, LEGAL LANGUAGE (2000); ENRIQUE ALCARAZ VARÓ & BRIAN HUGHES, LEGAL TRANSLATION EXPLAINED (2002); Brenda Danet, *Legal Discourse*, *in* HANDBOOK OF DISCOURSE ANALYSIS 270 (Teun A. Van Dijk ed., 1985) [hereinafter Danet, *Legal Discourse*]; Brenda Danet, *Language in the Legal Process*, 14 L. & SOC'Y REV. 445 (1980) [hereinafter Danet, *Language*].

[18] Law library and law bookstore shelves are filled with legal writing text books, how-to books and handbooks, all providing formats for memorandum, briefs, pleadings, letters and the like. While these books offer a guide on how to write as a lawyer, they do not delve into or even hint at the cognitive molding of genre bias. Collectively and individually, these books do confirm the existence of and need to adhere to the forms and norms of legal writing—the subgenres that are practice area and document type. *See, e.g.*, KENNETH A. ADAMS, LEGAL USAGE IN DRAFTING CORPORATE AGREEMENTS (2001); LINDA H. EDWARDS, LEGAL WRITING AND ANALYSIS (3d ed. 2011); ELIZABETH FAJANS ET. AL., WRITING FOR LAW PRACTICE: ADVANCED LEGAL WRITING (2d ed. 2010); JOYCE J. GEORGE, JUDICIAL OPINION WRITING HANDBOOK (5th ed. 2007); LAUREL CURRIE OATES & ANNE ENQUIST, THE LEGAL WRITING HANDBOOK: ANALYSIS, RESEARCH AND WRITING (5th ed. 2011) [hereinafter LEGAL WRITING HANDBOOK]; EDWARD D. RE & JOSEPH R. RE, BRIEF WRITING AND APPELLATE ARGUMENT (9th ed. 2005) [hereinafter BRIEF WRITING AND APPELLATE ARGUMENT]; JANE N. RICHMOND, LEGAL WRITING: FORM AND FUNCTION (2002); MICHAEL R. SMITH, ADVANCED LEGAL WRITING: THEORIES AND STRATEGIES IN PERSUASIVE WRITING (3d ed. 2012); JOHN SWALES, GENRE ANALYSIS: ENGLISH IN ACADEMIC AND RESEARCH SETTINGS (1980).

[19] *See infra* Part V.

[20] For more information on how humans categorize objects in terms of

every object, every event, every memory, every person, or every sock, stock, rock, picture, and book fits neatly into a specific category, and even though there are often overlaps and gaps, and misfits, we still cognitively categorize *everything*. This categorization includes texts—literary, legal, or otherwise. This categorization is a cognitive bias, and understanding this bias has everything to do with being a more effective and persuasive legal writer.

Genre is central to meaning-making[21] and channeling thinking, as either (or both) a generator for, or consequence of, the human cognitive bias to categorize. Therefore, genre influences decision-making. Categories of legal writing have been studied, but the study of genre as a cognitive bias in legal writing is uncharted water. Genre bias in lawyerly texts (legal writing) is real and it needs to be explored and appreciated. This Article seeks to do the former; lawyers need to do the latter.

In this Article, Part II provides an overview of genre studies in literature, which is the traditional home of such scholarship. After exploring genre studies, mostly from the humanities, Part III of this Article discusses the science of cognitive biases and the unicorn that is the "rational" decision-maker. The discussion of these areas of study uncovers a gap in need of a bridge. In Part IV, this Article

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common attributes, such as physical features and function, see John R. Anderson, *The Adaptive Nature of Human Categorization*, 98 PSYCHOL. REV. 409 (1991).

[21] "Meaning making", a concept in the humanities,

> draws on multiple traditions in sociology, anthropology, and other social sciences. At its root is the proposition that humans constantly seek to understand the world around them, and that the imposition of meaning on the world is a goal in itself, a spur to action, and a site of contestation. Meaning includes moral understandings of right and wrong, cognitive understandings of true and false, perceptual understandings of like and unlike, social understandings of identity and difference, aesthetic understandings of attractive and repulsive, and any other understandings that we may choose to identify through our own academic processes of meaning-making.

Charles Kurzman, *Introduction Meaning-Making in Social Movements*, 81 ANTHROPOLOGICAL Q. 5, 5 (2008).

builds that bridge by proposing that, in light of corresponding scholarship in the humanities, neuroscience, and social science, genre be considered a kind of cognitive bias.

Finally, with the bridge linking these areas of scholarship firmly in place, in Part V, this Article crosses the newly laid planks to apply genre bias to legal writing. This is done through a survey approach, with a brief foray into the legal sub-genres of wills and appellate briefs to highlight the importance of writing legal documents to conform to the genre. This section includes recommendations that practicing lawyers should almost never break the established genre in litigation documents unless no other good tactical choice remains and practicing lawyers should never break transactional documents genres—*ever*. Part VI concludes with an appeal to build on the genre analysis of legal writing undertaken in this Article and by law professors Michael Smith and Karen Sneddon along with humanities professors Vijay K. Bhatia and Michael Sinding, among others.

In the end, lawyers who cross that bridge and understand legal writing as, at least partially, a function of genre bias will better comprehend how legal texts are conceived, received, and perceived, and will be better lawyers as a consequence. The practical applications of this understanding are legion. Lawyers who conform their documents and pleadings to the correct genre will take advantage of that reader's genre bias. In this way, they will have a cognitive head start as the reader is already prepped to receive the substance of the text and is satisfied by recognizing what he expected.

By contrast, lawyers who eschew the appropriate genre create a cognitive hurdle that, in almost every case, runs counter to the client's best interests. To be sure, breaking the genre may cause the reader to pause and take notice, but that is not the same thing as achieving the result desired (and paid for) by the client.

Admittedly, judges and legal scholars are removed from those same strictures of genre compliance because they do not serve clients. Therefore, these legal writers are prone to occasionally break the genre of opinions or law review articles. Still, judges and legal scholars have an audience—an audience with expectations precast by genre. Victor Hugo aptly wrote that "life is a theatre set

in which there are but few practicable entrances."[22] Legal writing, all legal writing, is also a theater set, with performers, a script, and an audience. For the theater of legal writing, genre is not only the most practical entrance, but the essential one.

II. LITERATURE ON GENRE STUDY

Traditionally, scholars viewed genre as a class of texts "distinguished according to mutually exclusive and exhaustive characteristics."[23] In this way, genre is "a category of composition in music or literature, marked by a distinctive style, form, or content."[24] Sometimes called a "folk conception of genre,"[25] this oldest line of genre study dating back to Aristotle analyzes literary forms, such as poetry, prose, and plays.[26] More recently, genre has been pegged as a generative force vitally connected to social action.[27] This current description of genre expands the ancient genre paradigm so genres today are most often defined as "ways of recognizing, responding to, acting meaningfully within, and

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[22] *Chapter IV: The Back Room of Café Musain*, VICTOR HUGO, LES MISÉRABLES, http://www.cartage.org.lb/en/themes/BookLibrary/books/bibliographie/H/Hugovictor/LesMiserables/VolumeIII-Marius/book4/ch4.htm (last visited Oct. 19, 2013).

[23] George Kamberelis, *Genre as Institutionally Informed Social Practice*, 6 J. CONTEMP. LEGAL ISSUES 115, 118 (1995).

[24] Judy M. Cornett, *The Ethics of Blawging: A Genre Analysis*, 41 LOY. U. CHI. L.J. 221, 225–26 (2009) (citing THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 757 (3d ed. 1992)); *see also* Anthony Chase, *Toward a Legal Theory of Popular Culture*, 1986 WIS. L. REV. 527, 564.

[25] Petroski, *supra* note 14, at 246.

[26] Cornett, *supra* note 24, at 226.

[27] Social actions are the responses to "understanding how to participate in the actions of a community." Carolyn R. Miller, *Genre as Social Action*, 70 Q.J. SPEECH 151, 165 (1984). *See also* ANIS S. BAWARSHI & MARY JO REIFF, GENRE, AN INTRODUCTION TO HISTORY, THEORY, RESEARCH, AND PEDAGOGY 3–5 (2010); ALASTAIR FOWLER, KINDS OF LITERATURE: AN INTRODUCTION TO THE THEORY OF GENRES AND MODES (1982). In addition to the rhetorical and categorical genre paradigms, there are three other means of studying genre: genre in language studies, genre in systemic-functional linguistics and genre in applied linguistics. *See* John Corbett, *Genre and Genre Analysis*, *in* 5 ENCYCLOPEDIA OF LANGUAGE & LINGUISTICS 26, 26–29 (Keith Brown et al. eds., 2d ed. 2006).

helping to reproduce recurrent situations."[28] Known more particularly as *rhetorical situations*,[29] these recurrent situations are ones in which a speaker or writer can effect change. A simple example of a rhetorical situation can be found at a school board meeting where eliminating the art or gifted programs is being discussed and decided. A parent, who is there speaking against the cuts, finds herself in a rhetorical situation. Nearly everything a lawyer does in his or her professional role takes place in a rhetorical situation.

An influential work viewing genre this way is English professor Carolyn R. Miller's 1984 article, *Genre as Social Action*.[30] Miller points out that "situations are social constructs that are the result, not of perception, but of "definition."[31] She explains that this is so "because human action is based on and guided by meaning, not by material causes. At the center of this action is the

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[28] BAWARSHI & REIFF, *supra* note 27, at 3.

[29] According to Lloyd Bitzer, a rhetorical situation has three elements:

> (1) Exigence: "An imperfection marked by urgency; it is a defect, an obstacle, something waiting to be done, a thing which is other than it should be." There are many different kinds of exigencies, but a rhetorical one exists when discourse can modify it positively;
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> (2) Audience: an "audience consists only of those persons who are capable of being influenced by discourse and of being mediators of change"; and
>
> (3) Constraints "made up of persons, events, objects and relations which are parts of the situation because they have the power to constrain decision and action needed to modify the exigence."

Lloyd F. Blitzer, *The Rhetorical Situation*, 1 PHIL. & RHETORIC 1, 1–14 (1968). Bazerman defines "rhetorical situations" as consisting of "all the contextual factors shaping a moment in which a person feels called upon to make symbolic statement." CHARLES BAZERMAN, SHAPING WRITTEN KNOWLEDGE: THE GENRE AND ACTIVITY OF THE EXPERIMENTAL ARTICLE IN SCIENCE 8 n.10 (1988); *see also* Jason K. Cohen, *Attorneys at the Podium: A Plain-Language Approach to Using the Rhetorical Situation in Public Speaking Outside the Courtroom*, 8 J. ALWD 73, 75–80 (2011).

[30] *See* Miller, *supra* note 27.

[31] *Id.* at 156.

process of interpretation."[32] This is where genre, as a recurrent significant action "based in recurrent situations,"[33] comes into play[34] because genres and rhetorical situations are reciprocal.[35] To illustrate this point, English professor Amy J. Devitt of the University of Kansas cites the example of a grocery list. A list is considered a mundane grocery list because that simple document lists groceries and is used for the purpose of creating the recurrent situation of purchasing groceries by use of a list.[36] Indeed, every text produced within a genre "reinforces or remolds some aspect of the genre."[37] Professor Kirsten K. Davis of Stetson University College of Law notes that legal forms are like grocery lists in that they "serve as an idealization of past legal experience . . . . [that] formulates future experience,"[38] but she avoids the term "genre."

In one of the few law review articles that addresses genre, literary professor George Kamberelis summarizes six characteristics of genres, and genre bias can be inferred from the final one on this list.[39] Kamberelis writes that "for speakers and writers, hearers and readers, genres function as [cognitive] suppositional and metaphoric starting points for rhetorical and interpretative action within . . . [professional] fields."[40] As

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[32] *Id*. at 159, 165.

[33] *Id.* at 159.

[34] *See* ANNE HERRINGTON & CHARLES MORAN, GENRE ACROSS THE CURRICULUM 12 (2005).

[35] *See* Katherine Hall Jamieson, *Antecedent Genres as Rhetorical Constraints*, 61 Q.J. SPEECH 406 (1975) (arguing that antecedent genres and recurrent situations can have a reciprocal relationship in eliciting rhetorical responses).

[36] *See* AMY J. DEVITT, WRITING GENRES 23–24 (2004).

[37] BAZERMAN, *supra* note 29, at 8.

[38] Kirsten K. Davis, *Legal Forms As Rhetorical Transaction: Competency in the Context of Information and Efficienc*y, 79 UMKC L. REV. 667, 689 (2011).

[39] Kamberelis, *supra* note 23, at 121.

[40] *Id.* The other five characteristics of genre are (1) genres, texts, and social practices can be understood only when considered together; (2) within a particular professional field, genres develop dynamically as durable forms of communication are in relation to recurrent rhetorical situations; (3) rather than simple, genres are "complex configurations of formal features" and thematic content; (4) Genres originate from and belong to fairly specific professional

discussed more fully below in the section on *why not to break a genre*,[41] Kamberelis cites the work of Adena Rosmarin, who argues that genres function as "premises for arguments and metaphors for thinking that allow people to begin, but not to complete, acts of text production and interpretation."[42]

In this way, legal writers—like poets, reporters, or novelists—"view the world from generic perches."[43] It is from atop this perch that the three cognitive stages of genre bias operate: pre-reading, while-reading, and post-reading.[44] In the *pre-reading* stage, the reader forms the purpose for the applicable text and retrieves the schema.[45] The *while-reading* stage is the most cognitively complex.[46] In this stage, the reader engages in the text-perception process, which involves recognizing the conventional formal features of the genre and understanding the discourse semantics.[47] In the *post-reading* stage, the reader who has just finished reading the text now firmly assigns the genre and enriches the text with schemata[48] stored within his or her memory.[49]

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fields; (5) Genres are acquired, "learned and used as a function of situated practice" within certain settings and within specific professional fields. *Id.* at 120–21.

[41] *See infra* Part V.C.3.a.

[42] Kamberelis, *supra* note 23, at 156.

[43] *Id*. at 155.

[44] *See* Huijun Chen, *A Cognitive Model for Recognition of Genre*, 5 ASIAN SOC. SCI. 25, 28 (2009). This process parallels the process of the writer. *See also* Erika Abner & Shelley Kierstead, *A Preliminary Exploration of the Elements of Expert Performance in Legal Writing*, 16 LEGAL WRITING 363, 369–70 (2010). There are three basic text production processes of "planning [or] generating concepts and setting goals to be achieved within the text; translating ideas into text; and reviewing ideas and text [and] detecting faults at multiple levels." *Id.* (citation omitted).

[45] Chen, *supra* note 44, at 28. In the process of reading, "the environment sets up powerful expectations: we are already prepared for certain genres but not for others *before* we open a newspaper, a scholarly journal or the box containing some machine we have just bought." SWALES, *supra* note 18, at 88.

[46] Chen, *supra* note 44, at 28.

[47] *Id.*

[48] Schema (singular schemata) are mental structures for representing generic concepts stored in memory. *See generally* DAVID EVERETT RUMELHART, SCHEMATA: THE BUILDING BLOCKS OF COGNITION 38–58 (1980).

[49] Chen, *supra* note 44, at 28. See *infra* Part IV for more discussion of

Each of the above stages is essential in the persuasion process. A "thread" through the entire cognitive process is the prior knowledge of the genre characteristics and how genre functions within the mind of both the writer and the reader.[50] It is through this cognitive process that genres become "scheme-text-practice configurations that fuse form, content, and ideology"[51] in rhetorical situations for specific communities of practice. Accordingly, genres operate as a cognitive bias.

III. LITERATURE ON COGNITIVE BIAS

It is more reassuring to us to undergo a medical procedure with a ninety percent chance of success, compared with the same treatment that holds a ten percent mortality rate.[52] If asked, "How old is Brad Pitt?" and then asked, "How old is Joe Biden?," we estimate the Vice President's age to be higher than if first asked, "How old is Joe Biden?," and then asked, "How old is Brad Pitt?"[53] Losing $100 upsets more than finding $100 pleases.[54] While the causes of these phenomena are complex and multifactorial, "they are in part attributable to the fact that cognition is plagued by blind spots, preconceived assumptions, emotional influences, and built-in biases."[55] These biases are hardwired into our neural circuitry.[56]

In 1974, psychology professors Amos Tversky and Daniel Kahneman wrote, in their landmark article, that humans have a

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schemata.

[50] Chen, *supra* note 44, at 29.

[51] Kamberelis, *supra* note 23, at 154.

[52] *See* DANIEL KAHNEMAN, THINKING, FAST AND SLOW 88 (2011).

[53] *See* DEAN BUONOMANO, BRAIN BUGS: HOW THE BRAIN'S FLAWS SHAPE OUR LIVES 150–51 (2011). In an informal experiment, when asked to estimate actor Brad Pitt's age before Vice President Joseph Biden's, participants on average estimated Pitt to be 42.9 years old and Biden to be 61.1 years old. When asked Biden's age before Pitt's, participants on average estimated Pitt to be 44.2 years old and Biden to be 64.7 years old. At the time, Brad Pitt was 45 years old, and Vice President Biden was 66 years old. *Id.* at 151.

[54] *Id*. at 153.

[55] *Id.* at 144.

[56] *Id.* at 160–70.

"heuristics and biases" approach to information processing.[57] Predictions and judgments that we make intuitively are facilitated by a small number of separate mental operations. Heuristic examples[58] include insensitivity to an outcome's prior probability of outcome, over-confidence in subjective probability distribution, and false correlation.[59] These heuristics are essential to information processing, and, while they do have the advantage of increasing cognitive speed and efficiency, these processes can also lead to errors or biases when measured against reality.[60] Thus, a cognitive bias[61] is "a replicable pattern in perceptual distortion, inaccurate judgment, and illogical interpretation,"[62] or put simply, a

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[57] Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124, 1124–31 (1974) [hereinafter Tversky & Kahneman, *Heuristics and Biases*]. Heuristics, in simplest terms, are patterns of thinking. The brain constructs mental shortcuts, algorithms, to process information in an efficient manner. Over evolutionary time, these heuristics have proven advantageous allowing human to navigate a complex cognitive world quickly, and most of the time, to their evolutionary advantage. Cognitive biases are heuristics gone awry because the environmental circumstances in which that heuristic evolved has changed. *See id.* Daniel Kahneman was awarded the Nobel Prize in Economics for his pioneering work, along with Amos Tversky, in founding the discipline of behavioral economics which is based on cognitive biases in decision-making. For more information, see generally KAHNEMAN, *supra* note 52; Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk,* 47 ECONOMETRICA 263 (1979) [hereinafter Kahneman & Tversky, *Prospect Theory*]; Amos Tversky & Daniel Kahneman, *Extensional Versus Intuitive Reasoning: The Conjunction Fallacy in Probability Judgment*, 91 PSYCHOL. REV. 293 (1983) [hereinafter Tversky & Kahneman, *Extensional Versus Intuitive Reasoning*].

[58] Daniel Kahneman & Amos Tversky, *On the Reality of Cognitive Illusions*, 103 PSYCHOL. REV. 582 (1996) [hereinafter Kahneman & Tversky, *Cognitive Illusions*].

[59] *See* Tversky & Kahneman, *Heuristics and Biases*, *supra* note 57, at 1124–26, 1128.

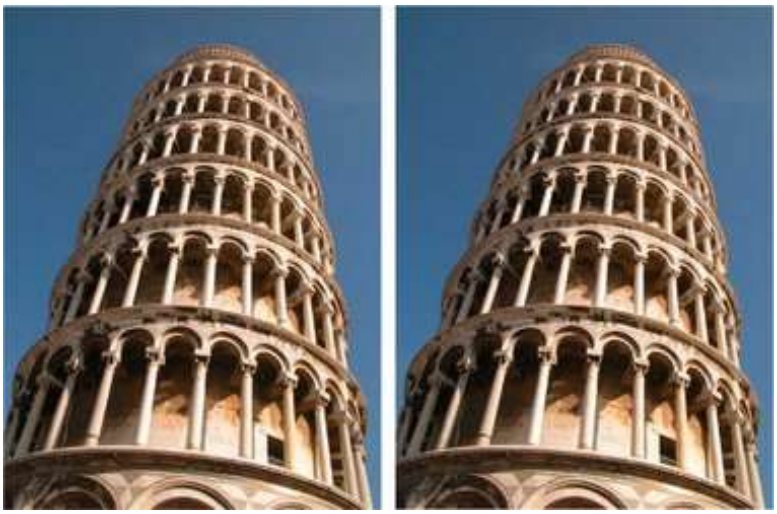
[60] *See id.* at 1131.

[61] Tversky & Kahneman use the terms "behavioral economics" or "judgment and decision making (JDM)" to describe what more recent scholars call "cognitive bias."

[62] *See* Daniel Kahneman & Amos Tversky, *Subjective Probability: A Judgment of Representativeness*, 3 COGNITIVE PSYCHOL. 430–54 (1972) [hereinafter Kahneman & Tversky, *Subjective Probability*]; *see also* DAN ARIELY, PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR

systematic non-random error in thinking. For instance, people remember occupations better than names.[63] We recall that the man on the plane is a baker, but we might forget that another man was named "Baker."[64]

A striking example of cognitive bias—because it operates even if you are looking for it—is the brain's misread of parallel images in what is called the *Leaning Tower Illusion*.[65] This is a phenomenon where an image of the famous tower viewed from below appears lopsided when placed next to a copy of itself.[66]



Brains presume that parallel lines, like railroad tracks,

DECISIONS (rev. ed. 2010) (recurrent irrationality in judgment and decision making); JONATHAN BARON, THINKING AND DECIDING (4th ed. 2007) (rationality in judgment and decision making).

[63] *See* Katherine H. McWeeny et al., *Putting Names To Faces*, 78 BRIT. J. OF PSYCHOL. 143–49 (1987).

[64] *See id.* at 146 (finding that participants in a study "recalled an occupation without a name more often than s/he recalled a name without an occupation"); *see also* BUONOMANO, *supra* note 53, at 4; Deborah M. Burke et.al, *On The Tip Of The Tongue: What Causes Word Finding Failures In Young And Older Adults?*, 350 J. MEMORY & LANGUAGE 542–579 (1991) (concluding that proper names are more difficult to learn and recall).

[65] Frederick A. A. Kingdom et al., *The Leaning Tower Illusion: A New Illusion of Perspective*, 36 PERCEPTION 475, 475–77 (2007).

[66] *Id.*

converge in the distance at a place called the vanishing point.[67] When we look up at these parallel lines in the photo, they do not converge,[68] but stop at the sky. Our brains, programmed to see parallel lines as converging, therefore interpret these lines as not parallel when they in fact are.[69] The lines are the same, but our brains irrationally say that they are not.[70] Despite this stark evidence, we strongly cling to the myth of the purely rational mind, including the mind of a decision-maker.

The traditional model of the decision-maker is that of a mythical "rational" person, who applies an objective analysis reason to a set of objective facts from which he or she deduces the correct decision.[71] While the falsity of this model is acknowledged and studied widely in other disciplines,[72] lawyers refuse to concede that they are not entirely rational beings and are reluctant to even acknowledge the issue.[73] Yet some within the legal community question the myth, if ever so slightly. For example, U.S. Court of Appeals for the Ninth Circuit Judge Marsha S. Berzon recently conceded that "researchers have convincingly demonstrated that in many instances people do not act as the robotic preference maximizers the law often assumes them to be."[74] She concludes that "it is not that humans are entirely irrational, but rather that our rationality is bounded."[75] By and large, however, lawyers continue

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[67] *See* BUONOMANO, *supra* note 53, at 144; *see also* James Galloway, *Perspectives on Mathematics in Art History*, 16 MATH HORIZONS 16 (2008).

[68] BUONOMANO, *supra* note 53, at 144.

[69] *See* Kingdom et al., *supra* note 65, at 475.

[70] *Id.*

[71] Herbert A. Simon, *A Behavioral Model of Rational Choice*, 69 Q. J. ECON. 99, 99 (1955) [hereinafter Simon, *Rational Choice*]; *see also* ARIELY, *supra* note 62; BARON, *supra* note 62.

[72] *See, e.g.*, ARIELY, *supra* note 62.

[73] *See, e.g.*, Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001) (exploring cognitive bias in judicial decision making); Ian Weinstein, *Don't Believe Everything You Think: Cognitive Bias in Legal Decision Making*, 9 CLINICAL L. REV. 783–834 (2003) (asserting that lawyers must recognize cognitive bias in their clients and themselves to counsel effectively).

[74] Marsha S. Berzon, *Dissent, "Dissentals," and Decision Making*, 100 CALIF. L. REV. 1479, 1481 (2012).

[75] *Id.* (citation omitted).

to ride that mythic unicorn that is the purely rational man.[76] Science shows that the unicorn does not exist and lawyers need to recognize that reality.

The cognitive science behind the understanding of behavior is necessary to the study of law because "[l]aws are made by humans."[77] Professor Kathryn M. Stanchi of Temple University James E. Beasley School of Law and other scholars recognize that understanding cognitive processes is important to all lawyers and, specifically, legal writers. Stanchi declares that "the art of persuasion requires empathy as well as a deep understanding of human psychology and the complex emotional and intellectual processes that result in perception and attitude change."[78] She is right. To do their job, lawyers need to understand how people think both rationally and *irrationally*, and how people change their minds both predictably and *unpredictably*.[79]

While lawyers are beginning to take note, this contemporary discussion of cognitive bias and the law was foreshadowed eighty years ago by Judge Jerome Frank, who introduced the idea of sociological jurisprudence,[80] now called Behavioral Decision Theory.[81] Recently, there has been a move to augment the law-and-

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[76] *See* Deborah J. Merritt, *Legal Education in the Age of Cognitive Science and Advance Classroom Technology*, 14 B.U. J. SCI. & TECH. L. 39, 41 (2008) ("Despite significant advances in the science of learning, law professors today teach much as their own professors did a generation ago. Legal scholars and lawyers know surprisingly little about the cognitive science research that has unveiled new methods of harnessing the brain to work harder and smarter. The legal profession depends upon rigorous thinking, creative problem solving, and persuasive advocacy for success. Yet, law faculties have remained strangely oblivious to research about how the brain works.").

[77] Terrance Chorvat et al., *Law and Neuroeconomics*, 13 SUP. CT. ECON. REV. 35, 35 (2005).

[78] Kathryn M. Stanchi, *The Science of Persuasion: An Initial Exploration*, 2006 MICH. ST. L. REV. 411, 412.

[79] Even Judge Marsha Berzon recognizes "[b]ecause our cognitive resources are limited, we often use heuristics, or mental shortcuts, to solve complex problems. These shortcuts, while useful in allowing us efficiently to approximate solutions to difficult problems, sometimes result in errors. Importantly, these flaws are not random. Rather, humans err in consistent, predictable ways." Berzon, *supra* note 74, at 1481–82.

[80] *See* JEROME FRANK, LAW AND THE MODERN MIND (1930).

[81] Donald C. Langevoort, *Behavioral Theories of Judgment and Decision*

economics movement, embraced for the last thirty years,[82] with a law-and-behavioral-science approach. This approach draws on cognitive science, sociology, and other behavioral sciences rather than relies on the rational decision maker.[83] A host of psychological factors "influence individual judgment and choices," including "beliefs, attitudes, emotions, and social forces, along with purely cognitive processes."[84] While lawyers and judges try to take account of, and discount for, these factors—at least the ones of which they are aware—the cognitive bias aspect of "Purely cognitive processes,"[85] often escapes attention.

The "invisible hand of cognitive bias"[86] takes many forms and refers to making decisions in ways that systematically depart from rational choice.[87] One example of cognitive biases studied is the

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Making in Legal Scholarship: A Literature Review, 51 VAND. L. REV. 1499, 1501 (1998). *See also* BEHAVIORAL LAW AND ECONOMICS (Cass R. Sunstein ed., 2000); Jeffrey J. Rachlinkski, *The "New" Law and Psychology: A Reply to Critics, Skeptics, and Cautious Supporters*, 85 CORNELL L. REV. 739 (2000).

[82] *See, e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (8th ed. 2010); Thomas S. Ulen, *Rational Choice Theory in Law and Economics*, *in* ENCYCLOPEDIA OF LAW AND ECONOMICS (Boudwijn Bockaert & Gerrit De Geest eds., 1999); A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 10 (3d ed. 2003).

[83] *See generally* Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CALIF. L. REV. 1051 (2000) (asserting that human behavior is better understood through behavioral and sociocultural theories than the rational choice theory).

[84] Langevoort, *supra* note 81, at 1503.

[85] *Id.*

[86] Marybeth Herald, *Deceptive Appearances: Judges, Cognitive Bias, and Dress Codes*, 41 U.S.F.L. REV. 299, 303 n.24 (2007). It is important to point out that although the existence of a systemic cognitive bias is a departure from pure rationality, as philosophers like Jon Elster and legal scholars Jules Coleman and Robert Scott have noted, "Identifying a departure from rationality is not the same as discovering irrationality." Langevoort, *supra* note 81, at 1506; *see also* JON ELSTER, SOUR GRAPES: STUDIES IN THE SUBVERSION OF RATIONALITY (1985). Cognitive biases may be adaptive (beneficial) for most people most of the time. Just because cognitive biases may not be based in reason, it does not mean that they are necessarily bad. Bad or good, the point is that they need to be recognized for what they are and taken into account in advocating a client's position as well as in administering justice.

[87] *See* Korobkin & Ulen, *supra* note 83, at 1076–1102 (exploring cognitive

human genetic predisposition to react to and interact with stories.[88] Legal scholars point out that "[s]torytelling really is part of general lawyering skills, just as much as legal analysis, logic, and argumentation,"[89] and it is important in every aspect of the practice of law.[90] Legal scholars have also focused on another type of cognitive bias called "framing theory," which posits that humans have a stronger disposition to avoid loss rather than attain gain.[91] This bias is why we are more likely to agree to undergo a medical

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bias in common decision-making tasks, such as playing a game of chess or choosing health care insurance providers).

[88] *See generally* JOSEPH CARROLL, READING HUMAN NATURE: LITERARY DARWINISM IN THEORY AND PRACTICE (2011); JONATHAN GOTTSCHALL, LITERATURE, SCIENCE, AND A NEW HUMANITIES (2008).

[89] *Legal Storytelling is an Innovative Approach to Law Education at Rutgers-Camden*, RUTGERS TODAY (Aug. 18, 2011), http://news.rutgers.edu/medrel/news-releases/2011/08/legal-storytelling-a-20110818. *See also* JAMES BOYD WHITE, HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW (1985); Brian J. Foley & Ruth Anne Robbins, *Fiction 101: A Primer for Lawyers on How to Use Fiction Writing Techniques to Write Persuasive Fact Sections*, 32 RUTGERS L.J. 459, 465 (2001); James Boyd White, *What Can a Lawyer Learn from Literature?*, 102 HARV. L. REV. 2014, 2021 (1989) (reviewing RICHARD A. POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION (1988)).

[90] *See, e.g.*, Kenneth D. Chestek, *The Appellate Brief as Story*, 14 LEGAL WRITING 127 (2008); Bret A. Rappaport, *Tapping the Human Adaptive Origins of Storytelling by Requiring Legal Writing Students to Read a Novel In Order to Appreciate How Character, Setting, Plot, Theme, and Tone (CSPTT) are as Important as IRAC*, 25 T.M. COOLEY L. REV. 268 (2008); Donna M. Steslow & Carolyn Gardner, *More than One Way to Tell a Story: Integrating Storytelling into Your Law Course*, 28 J. LEGAL STUD. EDUC. 249 (2011).

[91] *See* Chris Guthrie, *Framing Frivolous Litigation: A Psychological Theory*, 67 U. CHI. L. REV. 163, 166–67 (2000) [hereinafter Guthrie, *Framing Frivolous Litigation*]; Chris Guthrie, *Prospect Theory, Risk Preference, and the Law*, 97 NW. U. L. REV. 1115, 1117–19 (2003) [hereinafter Guthrie, *Prospect Theory*]; *see also* Allen v. Chance Mfg. Co., 873 F.2d 465, 470 (1st Cir. 1989) (using framing theory to analyze jury's finding of proximate cause). The adaptive basis for the aversion to loss is that we do not perish from passing up a positive choice, but a wrong step could spell doom. We are, therefore, predisposed, biased, to avoid loss rather than seek gain. *See generally* Todd McElroy & John J. Seta, *Framing the Frame: How Task Goals Determine the Likelihood and Direction of Framing Effects*, 2 JUDGMENT & DECISION MAKING 251 (2007); Kahneman & Tversky, *Heuristics and Biases*, *supra* note 57; Kahneman & Tversky, *Prospect Theory*, *supra* note 57.

procedure with a ninety percent chance of success than the same procedure when it carries a ten percent mortality rate.[92] Another bias called "temporal discounting" is the phenomenon in which we privilege the present and discount the future.[93] In other words, we want things now.[94] For example, most people choose $100 today in place of $120 a month from now.[95] There is also hindsight bias—when looking back, humans tend to overestimate the likelihood that they could have anticipated a future event.[96] The "brain bug"[97] of hindsight bias has been explored by examining the manner by which bankruptcy judges go about finding fraudulent conveyances in the cases presented to them.[98] With this background in mind, this Article now turns to genre bias, one of the many cognitive biases that operate within the legal writing context.

IV. GENRE IS A COGNITIVE BIAS

Cognitive biases, and by extension genre bias, are an innate part of human psychology.[99] In our ancestral past, biases were mainly adaptive (i.e., advantageous to survival or reproduction).

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[92] KAHNEMAN, *supra* note 52, at 88.

[93] BUONOMANO, *supra* note 53, at 100; Thomas S. Critchfield & Scott H. Kollins, *Temporal Discounting: Basic Research and the Analysis of Socially Important Behavior*, 34 J. APPLIED BEHAV. ANALYSIS 101, 102 (2001).

[94] *See* Bret A. Rappaport, *A Shot Across the Bow: How to Write an Effective Demand Letter*, 5 J. ALWD 32, 40–41 (2008) ("People want things now, even when waiting for the payout will actually result in a greater benefit.").

[95] BUONOMANO, *supra* note 53, at 99–102.

[96] *See* Guthrie, *Prospect Theory*, *supra* note 91, at 1499, 1504; *see also* Jennifer Bonds-Raacke et al., *Hindsight Bias Demonstrated in the Prediction of Sporting Event*, 141 J. SOC. PSYCHOL. 349 (2001).

[97] Psychology professor Dean Buonomano of the University of California at Los Angeles refers to "brain bugs" as subtle biases, illusions, and irrationality that affect our decision-making abilities. *See* BUONOMANO, *supra* note 53, at 1–3.

[98] Michael Simkovic & Benjamin Kaminetzky, *Leveraged Buyout Bankruptcies, the Problem of Hindsight Bias, and the Credit Default Swap Solution*, 2011 COLUM. BUS. L. REV. 118, 151–55 (2010) ("Several studies set in a context resembling the circumstances of bankruptcy judges in fraudulent transfer cases against [leveraged buyout bankruptcy] lenders have found evidence of hindsight bias.").

[99] *See* BUONOMANO, *supra* note 53, at 1–5.

While some biases remain adaptive,[100] many biases are now maladaptive. This is due to the disconnection between our evolutionary environment and our modern world—legal[101] and otherwise.[102] Given what literary scholars say about genre and what researchers in the scientific community say about cognitive bias, genre should be considered a kind of cognitive bias.

A comprehensive explanation of the claim that genre is an innate adaptive trait would be beyond this Article's scope. In fact, the social science world is already fully engulfed in the broader endeavor of determining whether certain behaviors are the product of nature (adaptive) or the product of culture.[103] Entire books have been devoted to the subject of whether behaviors like art and music are innate and adaptive traits.[104] This Article, instead, focuses on exposing the logical existence of genre bias by exploring genre literature and through detailing the empirical evidence.

First, however, it is important to understand how the human mind works and has evolved. The human mind is an "intricate, evolved machine that has allowed humans to inhabit"[105] this complex, ever-changing world. In this complex world, humans must survive, thrive, and reproduce. The brain effectively solves a

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[100] *See* Robert A. Cummins & Helen Nistico, *Maintaining Life Satisfaction: The Role of Positive Cognitive Bias*, 3 J. HAPPINESS STUD. 37 (2002); Martie G. Haselton et al., *Adaptive Rationality: An Evolutionary Perspective On Cognitive Bias*, 27 SOC. COGNITION 732 (2009) (summarizing dozens of positive cognitive biases).

[101] *See* Linda Hamilton Krieger, *Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1188 (1995) (asserting that traditional overt discrimination has given way to subtle intergroup bias stemming from stereotypes and other cognitive distortions); Joseph W. Rand, *Understanding Why Good Lawyers Go Bad: Using Case Studies in Teaching Cognitive Bias in Legal Decision-Making*, 9 CLINICAL L. REV. 731, 745–46 (2003).

[102] *See, e.g.*, Aaron T. Beck, *Cognitive Models of Depression*, 1 J. COGNITIVE PSYCHOTHERAPY 5 (1987) (describing depression as a consequence of cognitive biases).

[103] *See generally* STEVEN PINKER, THE BLANK SLATE: THE MODERN DENIAL OF HUMAN NATURE (2003); EDWARD O. WILSON, CONSILIENCE: THE UNITY OF KNOWLEDGE (1998).

[104] *See, e.g.*, DENIS DUTTON, THE ART INSTINCT: BEAUTY, PLEASURE, AND HUMAN EVOLUTION (2010).

[105] Haselton et al., *supra* note 100, at 733.

host of problems through "large-scale cooperation, social exchange, habitat formation, agriculture, and cumulative culture."[106] While Evolution is the ultimate determiner of our species' physical characteristics[107] many have questioned whether Evolution predisposes and guides behavior as well.[108] The determination that a given behavior is or is not an adaptive product of biological evolution is not made under a microscope and behaviors do not fossilize. However, this that does not mean we cannot explore a variety of factors to determine if a given behavior is an aspect of universal human psychology, and therefore, a likely product of evolution. With greater frequency, scholars are highlighting an array of human behaviors—such as art,[109] storytelling,[110] music,[111] and even rhetoric[112]—that are likely

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[106] *Id.*

[107] Evolution, called descent with modification, is simply the species-based law of adapt and procreate—or perish. *See generally Evolution 101, Descent with Modification*, UNIV. OF CAL. – BERKELEY, http://evolution.berkeley.edu/evosite/evo101/IIIADescent.shtml (last visited Oct. 19, 2013). Genetic drift and natural selection drive evolution. Genetic drift is the random alteration of inherited traits (in the form of gene alleles) from ancestor to descendent. Some mutations are positive, called adaptive, and some are negative, called maladaptive. Natural selection is the interaction of members of a population with their ecosystem such that those individuals with the traits better adapted to the environment will survive longer and have more reproductive success. These fertile adapters pass on those favored traits to their descendants. Those organisms not as well adapted to survive and procreate have fewer or no descendants. Over generations, those organisms possessing adaptive traits succeed. Those without such trait(s) fail. *See generally* DANIEL C. DENNET, DARWIN'S DANGEROUS IDEA: EVOLUTION AND THE MEANING OF LIFE 39–42 (1996).

[108] *See generally* ALAS, POOR DARWIN: ARGUMENTS AGAINST EVOLUTIONARY PSYCHOLOGY (Hilary Rose and Steven Rose eds., 2000).

[109] *See, e.g.*, DUTTON, *supra* note 104.

[110] *See* BRYAN BOYD, ON THE ORIGIN OF STORIES: EVOLUTION, COGNITION, AND FICTION (repr. 2010); JOSEPH CARROLL, LITERARY DARWINISM: EVOLUTION, HUMAN NATURE, AND LITERATURE (2004); JOSEPH CARROLL, READING HUMAN NATURE: LITERARY DARWINISM IN THEORY AND PRACTICE (2011).

[111] *See* Steven Brown, *The "Musilanguage" Model of Music Evolution*, *in* THE ORIGINS OF MUSIC 271, 296 (Nils L. Wallin et al. eds., 2001). *See also* Ellen Dissanayake, *Antecedents of the Temporal Arts in Early Mother-Infant Interaction*, *in* THE ORIGINS OF MUSIC 389, 391–405 (Nils L. Wallin et al. eds.,

adaptive, and genre should be added to that list.

There are a number of key areas of inquiry for determining whether an aspect of behavior is adaptive. These include whether there is the cross-cultural presence of the trait, how far back in human history the trait can be found, and whether the trait bestowed some evolutionary advantage on early humans.[113] Based on these factors, some have argued that art[114] and stories[115] are adaptive. But the most telling evidence that a behavior may well be the product of evolution is the fact that the trait is practiced everywhere—the so-called "human universals."[116]

Universals are "those (empirically determined) features of culture, society, language, and psyche found in all ethnographically or historically recorded human societies."[117] Human universals are not features of anatomy like eyes, but rather are products of the mind.[118] In a broader context view, "the human common sense view of the world" is a universal.[119] Some of the hundreds of human universals[120] include tools and tool-making, myths, legends, fear of snakes, proverbs, sex roles, music, kinship systems, grammar, marriage, personal names, and so on. Since the traits are universal between different areas and cultures, "it is plausible that these traits have a biological basis and that they are

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2001).

[112] *See* Bret A. Rappaport, *Darwinian Ceremonies: Is the Rhetoric of Praise and Blame Adaptive?*, 2 EVOLUTIONARY REV. 151 (2011).

[113] *See, e.g.*, DUTTON, *supra* note 104, at 84.

[114] *See, e.g.*, *id.*

[115] *See, e.g.*, BOYD, *supra* note 110.

[116] Donald E. Brown, *Human Universals and Their Implications*, *in* BEING HUMANS: ANTHROPOLOGICAL UNIVERSALITY AND PARTICULARITY IN TRANSDISCIPLINARY PERSPECTIVE 156, 156 (Neil Roughley ed., 2000).

[117] *Id.* at 156.

[118] *Id*. at 157.

[119] EDWARD G. SLINGERLAND, WHAT SCIENCE OFFERS THE HUMANITIES: INTEGRATING BODY AND CULTURE 139 (2008) ("It is the existence and interaction . . . that gives rise to the human 'commonsense' view of the world, which remains quite robustly universal despite the vagaries of cultural variation.").

[120] Donald E. Brown provides a list of Human Universals in STEVEN PINKER, THE BLANK SLATE 434–39 (2002).

evolved features of a universal human nature."[121] Universals commonly arise because they are "good tricks"—forced solutions to recurring situations.[122] Genres are such a "good trick," and while

> [n]o one would defend the idea that there is a "hero-slays-dragon-and-wins-hand-of-beautiful-maiden" gene in the human gene pool[,] . . . given that there is a nontrivial set of innate human desires and capacities, and the fact that the world in which humans operate has had a fairly stable structure for at least the past several millennia, it is not surprising that tales of evil stepmothers or brave underdog heroes will arise universally and have universal appeal.[123]

Similarly, although there is no "genre" gene, any more than there is a "hero-slays-dragon-and-wins-hand-of-beautiful-maiden" gene, genre is a human universal. Genre is just like art, music, marriage, personal names, and the rest.[124] Genre, as a functional way to categorize and think, transcends cultures and environments.

Recognized for at least 2,500 years,[125] genre bestows a host of advantages on humans. For example, genre allows humans to process information more quickly.[126] A host of studies attest to the

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[121] Elizabeth Cashdan, *What is a Human Universal? Human Behavioral Ecology and Human Nature*, *in* ARGUING ABOUT HUMAN NATURE: CONTEMPORARY DEBATES 71, 71 (Stephen M. Downes & Edouard Machery eds., 2013). There remains some debate as to "true universals" versus "conditional universals." Donald E. Brown, *Human Universals, Human Nature, And Human Culture*, 133 DAEDALUS 47–54 (2004). The former apply to all humans while the latter are selected for. Brown, who cites only to true universals, undervalues human innateness, argues Haidt. *See* JONATHAN HAIDT, THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION 130–32 (2013).

[122] HAIDT, *supra* note 121, at 139 (citing DENNET, *supra* note 107, at 486).

[123] SLINGERLAND, *supra* note 119, at 140–41.

[124] *See* Miller, *supra* note 27, at 161–62 (citing KENNETH BURKE, A GRAMMAR OF MOTIVES 103–04 (1969)).

[125] Plato divided literature into three genres: poetry, drama, and prose. *See* GERARD GENNETTE, THE ARCHITEXT: AN INTRODUCTION 6 (Jane E. Lewin trans., 1992).

[126] *See* Gary M. Olson et al., *Cognitive Aspects of Genre*, 10 POETIC 283 (1981). *See also* Karl F. Haberlandt & Arthur C. Graesser, *Component*

effect genre has on comprehension,[127] recall, and memory.[128] In fact, genre manifests itself in children as early as pre-school age,[129] and "[u]nderstanding the effect of genre on reading could lead to more efficient teaching strategies and interventions in schools."[130] A recent study of medical students for whom English was a second language points in a similar direction.[131] The researchers concluded that there may be pedagogical value in "sensitizing students to rhetorical effects and to rhetorical structure that recur in genre-specific texts, to activate and develop schemata, to have learners schematize and/or criticize different textual structures and provide prototypical examples of scientific rhetoric."[132]

In addition to the inferential evidence, neuroscience has studied

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Processes in Text Comprehension and Some of Their Interactions, 114 J. EXPERIMENTAL PSYCHOL. GEN. 357 (1985) (showing the relationship between categorization and the ability to process information); K.M. Zabrucky & D. Moore, *Influence of Text Genre on Adults' Monitoring of Understanding and Recall*, 25 EDUC. GERONTOLOGY 691 (1999) (discussing memory management processes in older adults).

[127] *See, e.g.*, Olson et al., *supra* note 126; Charles A. Weaver & Deborah S. Bryant, *Monitoring of Comprehension: The Role of Text Difficulty in Metamemory for Narrative and Expository Text*, 23 MEMORY & COGNITION 12 (1995).

[128] *See* Arthur C. Graesser et al., *Advanced Outlines, Familiarity, and Text Genre on Retention of Prose*, 48 J. EXPERIMENTAL EDUC. 281 (reporting findings that narrative passages were better recalled than were expository passages); Michael B. W. Wolfe, *Memory for Narrative and Expository Text: Independent Influences of Semantic Associations and Text Organization* 31 J. EXPERIMENTAL PSYCHOL. LEARNING, MEMORY, & COGNITION 359 (2005).

[129] Ruth A. Berman & Bracha Nir-Sagiv, *Comparing Narrative and Expository Text Construction Across Adolescence: A Developmental Paradox*, 43 DISCOURSE PROCESSES 79, 104–05 (2007).

[130] Amy Kurivchack Landers, An Examination of Genre Differences 3 (Aug. 2010) (unpublished Ph.D. dissertation, University of Minnesota) (on file with author).

[131] Francoise Salager-Meyer, *Reading Expository Prose at the Post-Secondary Level: The Influence of Textual Variable on L2 Reading Comprehension (A Genre-based Approach)*, 8 READING FOREIGN LANGUAGE 645, 660 (1991) (citing Piedad Fernandez Toledo, *Genre Analysis and Reading of English as a Foreign Language: Genre Schemata Beyond Text Typologies*, 37 J. PRAGMATICS 1059, 1069 (2005)).

[132] Toledo, *supra* note 131, at 1069 (quoting Salager-Meyer, *supra* note 131, at 660).

how genre actually functions in the brain,[133] further indicating the existence of genre bias. In a series of articles on what he calls "cognitive category theory," and what this Article calls "genre bias," Professor Michael Sinding summarizes the landscape.[134] The classic view of cognition is that concepts are first mentally processed definitions, where each object is either included in or excluded from a category, and between members of a category there are no distinctions.[135] This is the essence of the ancient view of genre, and it is simplistic and mistaken. The more proper cognitive model for the recognition and operation of genre involves the interplay between Schema Theory, Prototype Theory, and its cousin—the Exemplar Theory.

Schema Theory postulates that all knowledge is organized into units or categories.[136] Many scholars have observed that schemata "guide the production and comprehension of both content and forms of text."[137] "We make sense of our new experiences by placing them into categories . . . [and] these mental blueprints provide both shortcuts and stereotypes."[138] As sets of related elements, genre schemas "organize knowledge about related . . .

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[133] *See generally* MARK TURNER, READING MINDS: THE STUDY OF ENGLISH IN THE AGE OF COGNITIVE SCIENCE 150 (1991).

[134] Michael Sinding, "*A Sermon in the Midst of a Smutty Tale:" Blending in Genres of Speech, Writing and Literature*, *in* COGNITIVE LITERARY STUDIES: CURRENT THEMES AND NEW DIRECTIONS 145, 157 & n.1 (Isabel Jean & Julien Jacques Simon eds., 2012) [hereinafter Sinding, *A Sermon in the Midst*]; Sinding, *After Definitions*, *supra* note 2 at 184–85, 214–15; Michael Sinding, *Blending in a Baciyelmo*: *Don Quixote*'s *Genre Blending and the Invention of the Novel*, *in* BLENDING AND THE STUDY OF NARRATIVE 147 (Ralf Schneider & Marcus Hartner eds., 2012); Michael Sinding, *Framing Monsters: Multiple and Mixed Genres, Cognitive Category Theory, and* Gravity's Rainbow, 31 POETICS TODAY 465, 467 (2010) [hereinafter Sinding, *Framing Monsters*].

[135] Sinding, *Framing Monsters*, *supra* note 134, at 474.

[136] *See generally* RUMELHART, *supra* note 48.

[137] Chen, *supra* note 44, at 27; *see also* GIBBONS, *supra* note 17, at 11; JEAN MATTER MANDLER, STORIES, SCRIPTS, AND SCENES: ASPECTS OF SCHEMA THEORY (1984) (discussing how schemata inform one's understanding of stories); SWALES, *supra* note 18, at 83–92.

[138] Linda L. Berger, *The Lady, or the Tiger? A Field Guide to Metaphor & Narrative*, 50 WASHBURN L.J. 275, 280 (2011).

texts."[139] In this way, genre functions as a "sense of the whole by which we may understand all of the parts."[140] Professor Sinding expressly argues that "much is gained when we regard genres as schemas."[141] Specifically, he explains that genres are "constellations of features at multiple levels" and proposes a model for genres of all kinds.[142] In order from highest level to lowest level, his "genre generic space" looks like this:

- Sociocognitive Action Frame: occasion, communicative purpose, social action context (including other genres)

- Rhetorical Situation Frame: setting, speaker, audience, medium

- Discourse Structure Frame:
    1) Extraliterary: sequence of discourse elements and relations (moves and steps), including form, speech act type, style, etc.
    2) Literary (Fiction): narrative (fictional rhetorical situation, story world with settings, characters, actions), narration (order of narration, form, style, etc.)[143]

Sinding explains that each "frame" is embedded in the higher order frame, although they are nevertheless distinct. In the sociocognitive frame, the action is performed to "achieve a purpose on an occasion, with a certain rhetorical situation," and in the intermediary frame, the writer or speaker communicates to an audience "using a certain discourse structure."[144] Sinding's above tripartite model offers an excellent means by which to look at legal genres as nested schemas. Like Russian dolls, the outermost generic frame (Sociocognitive Action) is "thinking like a lawyer,"

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[139] Sinding, *After Definitions, supra* note 2, at 195 (citation omitted).

[140] *Id.* at 196 (citing E.D. HIRSCH, JR., VALIDITY IN INTERPRETATION 71–89 (1967)).

[141] *Id.*

[142] *Id*.

[143] *Id*. at 196–97.

[144] *Id.* at 197.

the type of law—patent, divorce, criminal, etc.—is the middle doll (Rhetorical Situation), and the most specific genre, being the actual documents, such as application, divorce decree, or jury waiver (Discourse Structure).

Developed by Dr. Eleanor Rosch and other researchers in the early 1970s, Prototype Theory postulates that people categorize items and concepts based on an idealized, or average, idealized representation of that category.[145] A good example is a dog.[146] When discussing dogs, people often think of collies or retrievers, because such pooches represent the ideal prototype as opposed to pugs or Pomeranians.[147] The Exemplar Theory is a cousin to Prototype Theory because they both employ a model.[148] While the prototype view says that "we learn a summary representation of the whole category and classify by comparing the new items to the prototype," the "exemplar view explains says that people categorize by learning and using specific remembered examples"[149] known as a "paragon."[150] Within genre theory, a paragon becomes the model for others to emulate.[151] Babe Ruth, Willie Mays, and Sandy Koufax are examples of baseball paragons.[152] A paragon of the trial lawyer might be Clarence

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[145] *See* BAWARSHI & REIFF, *supra* note 27, at 38–39; *see also* SWALES, *supra* note 18, at 51–52; Eleanor H. Rosch, *Cognitive Representation of Semantic Categories*, 104 J. EXPERIMENTAL PSYCHOL. GEN. 192, 224–26 (1975); Eleanor H. Rosch, *Natural Categories*, 4 COGNITIVE PSYCHOL. 328 (1973).

[146] Sinding, *Framing Monsters*, *supra* note 134, at 480.

[147] *See* Carolyn B. Mervis & Eleanor E. Rosch, *Categorization of Natural Objects*, 32 ANN. REV. PSYCHOL. 89 (1981).

[148] *See generally* DANIEL REISBERG, COGNITION: EXPLORING THE SCIENCE OF THE MIND (4th ed. 2009); Kirsten Abbot-Smith & Michael Tomasello, *Exemplar-Learning and Schematization in a Usage-Based Account of Syntactic Acquisition*, 23 LINGUISTIC REV. 275 (2006); Douglas Hintzman, *"Schema Abstraction" in a Multiple-Trace Memory Model*, 93 PSYCHOL. REV. 328 (1986).

[149] *See* Sinding, *Framing Monsters*, supra note 134, at 480.

[150] *Id*. at 493.

[151] *Id.*

[152] *See id.* (citing George Lakoff, *Cognitive Models and Prototype Theory*, *in* CONCEPT AND CONCEPTUAL DEVELOPMENT: ECOLOGICAL AND INTELLECTUAL FACTORS IN CATEGORIZATION 79 (Ulric Neisse ed., 1987)).

Darrow, and to a law student, a paragon contract might be the one he or she first studied in law school. Form books, often based on documents validated in court opinions, are examples of paragon documents.

This is not just all theory. Because scientists can now see and measure brain activity in response to defined stimuli, neural imaging and cognitive science have also uncovered the neural substrates and networks that play key roles in categories of both knowledge and prototype thinking.[153] As Indiana University Associate Professor of Spanish & French World Languages Julien Simon concludes, "[G]enres are an integral part of cognition . . . [w]e naturally cluster the information picked up from our environment . . . ."[154]

Finally, although by a different name, the existence of a genre bias has been directly explored by scholars. For example, in 1999, researchers examined whether the labeling of certain lyrics without accompanying music as "rap," "heavy metal," "pop," or "country" would influence a reader's interpretation of lyrics as pro-social or antisocial.[155] The lyrics labeled as "rap" or "heavy metal" led participants to conclude that those songs were less likely to inspire pro-social behavior than when those same lyrics were labeled "pop" or "country."[156] Similar studies outside the realm of music genre research reveal how a reader's comprehension is influenced—or biased—by labeling a given text as one genre or another. In one study, researchers established that calling a given

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[153] *See generally* Alexander G. Huth et al., *A Continuous Semantic Space Describes the Representation of Thousands of Object and Action Categories Across the Human Brain*, 76 NEURON 1210 (2012); Mark L. Johnson, *Mind, Metaphor, Law*, 59 MERCER L. REV. 845, 848–56 (2007); Paul J. Reber et al., *Dissociating Explicit and Implicit Category Knowledge with fMRI*, 15 COGNITIVE NEUROSCIENCE 574–83 (2006); Simon, *Rational Choice*, *supra* note 71, at 107 (citing FRIEDMANN PULVERMULLER, THE NEUROSCIENCE OF LANGUAGE ON BRAIN CIRCUITS OF WORDS AND SERIAL ORDER (2002)).

[154] Julien Simon, A Neurocognitive Study of Literary Genres: The Case of the Novela Dialogada 9 (Dec. 2006) (unpublished Ph.D. dissertation, Purdue University) [hereinafter Simon Ph.D. Thesis], *available at* http://search.proquest.com/docview/305265351.

[155] *See* Mary E. Ballard et al., *Genre of Music and Lyrical Content: Expectation Effects*, 160 J. GENETIC PSYCHOL. 476, 477 (1999).

[156] *Id.* at 482–84.

text either "a literary story" or "a news story" greatly impacted the reader's comprehension.[157] Specifically, subjects reading the text as "literature" experienced longer reading times, better memory of surface information, and poorer memory of situational information as compared to those who read the same text under a "news" label.[158] Researchers suggest that "information about text genre triggers strategic processes in reading [and that] in most naturalistic situations, people read texts belonging to a particular genre, and they adhere (consciously or subconsciously) to the constraints of that genre."[159]

Indeed, new biases are "discovered" regularly. Following on Simon's work, now is as good a time as any to discover genre bias—a cognitive bias hiding in plain sight. The published list[160] of cognitive biases includes biases whose definitions overlap and others that work in unison or are part of suites of biases. However, genre bias has never before been recognized on a published list. It should be. Regardless of what it is called, ultimately genre bias helps create a reality by constraining writers' choices and channeling readers' expectations. French philosopher Jacques Derrida famously said that "[t]here is no genreless text."[161] And certainly, genre bias applies to every aspect of writing, including legal writing. Lawyers need to understand how genre shapes the perception of what they read and how it shapes the opinions and judgments derived from those readings.

V. GENRE BIAS IN LEGAL WRITING

A. New Rhetoric – A Road to Genre Bias in Legal Studies

To co-opt Derrida—there is no genreless legal text. This is true

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[157] Rolf A. Zwaan, *Effect of Genre Expectations on Text Comprehension*, 20 J. EXPERIMENTAL PSYCHOL. LEARNING MEMORY & COGNITION 920 (1994).

[158] *Id*.

[159] *Id*. at 931.

[160] For a sample list of cognitive biases, see *List of Cognitive Biases*, WIKIPEDIA, http://en.wikipedia.org/wiki/List_of_cognitive_biases (last visited Oct. 19, 2013).

[161] Jacques Derrida, *The Law of Genre*, *in* MODERN GENRE THEORY 219, 230 (David Duff ed., 2000).

for legal reading and writing.[162] Consequently, honoring the genre in legal writing by remaining true to its strictures bestows a positive cognitive bias, while breaking the genre is disadvantageous. Either way, genre bias skews rational thought, a fact of which lawyers must be aware and must be wary.

Stanchi points the way forward path, observing that "[a]dvocacy is most effective when the lawyer has the tools to make deliberate, conscious decisions about the persuasive device to employ and how . . . to employ it."[163] But traditionally, legal writing has been viewed as a "technical exercise in graphics"—the mere representation of thought in symbols.[164] However, this is backwards. John Marshall Law School Professor Joel R. Cornwell explains that "writing is the interplay of images that we call thinking, a processing of data into symbols that compel other symbols."[165] He continues: "Thought presupposes imagery because there is otherwise nothing to think . . . so writing is thought in its purest form."[166] This does not mean that writing is "necessary" for thought, or that the human mind is a "blank slate" upon which culture writes views of truth through symbols.[167] Rather, writing is the interplay between the body, the brain, and the outside world and is represented by symbols which help us interpret the world.[168]

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[162] *Cf.* Christine M. Venter, *Analyze This: Using Taxonomies to "Scaffold" Students' Legal Thinking and Writing Skills*, 57 MERCER L. REV. 621, 632 (2006) ("[R]eading is a way of constructing knowledge, and proficient readers actually *make* meaning by and through their interactions with the text. According to the New Rhetoric, what a reader understands and retains from the text and context depends upon the reader's prior knowledge of similar texts and contexts") (footnote omitted).

[163] Stanchi, *supra* note 78, at 413.

[164] Joel R. Cornwell, *Legal Writing as a Kind of Philosophy*, 48 MERCER L. REV. 1091, 1094 (1997).

[165] *Id*.

[166] *Id*. at 1094–95.

[167] *See generally* PINKER, *supra* note 103 (discussing the history of the view of the human mind as a blank slate and the modern view challenging that view).

[168] This holistic view of how we do this is called "embodied cognition" which "contends that cognitive processes develop when a tightly coupled system emerges from real-time, goal-directed interactions between organisms and their environment; the nature of these interactions influences the formation and

Writing, as a sign system, is a major component of the process of making meaning.[169]

The idea of writing as thought is an established one within the humanities.[170] But only now is the important consequence of writing and thought as "making meaning" generating inroads into the legal writing world. It is doing so under the moniker "New Rhetoric." As University of Nevada Law School Professor Linda L. Berger points out, "[i]n the New Rhetoric, writing is a process for creating knowledge, not merely a means for communicating it."[171] In New Rhetoric, genres are situated in the communities that give rise to them, where the specific genre is a "negotiable 'social fact' rather than an invariable set of conventions."[172] A good example of this is the genre of college writing and how students are constrained by the fact that they write for instructors

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further specifies the nature of the developing cognitive capacities." *Embodied Cognition*, IEP, http://www.iep.utm.edu/embodcog/ (last visited Oct. 19, 2013); *see also* Gerald M. Edelman, *The Embodiment of the Mind*, 135 DAEDALUS 23–32 (2006); SLINGERLAND, *supra* note 119, at 9–14.

[169] For a discussion of "meaning making," see *supra* note 2 and accompanying text. There is an interesting note when using the word "writing" in the context of embodied cognition. For example, the physical act of writing with pen and paper is more effective for learning then a computer. Specifically, writing sends feedback signals to the brain and leaves a "motor memory," which later makes it easier to recall the information connected with the actually physical movement. *See* Gulnaz Saiyed, *Writing By Hand Better for Learning, Study Shows*, MEDILL REPORTS CHI. (Jan. 27, 2011), http://news.medill.northwestern.edu/chicago/news.aspx?id=177291. The study is also discussed in Anne-Mangen & Jean-Luc Velay, *Digitizing Literacy: Reflections on the Haptics of Writing*, *in* ADVANCES HAPTICS 385 (Mehrdad Hosseini Zadeh ed., 2010).

[170] *See* CHARLES BAZERMAN ET AL., REFERENCE GUIDE TO WRITING ACROSS THE CURRICULUM 57 (2005); Mary Beth Beazley, *Better Writing, Better Thinking: Using Legal Writing Pedagogy in the "Casebook" Classroom (Without Grading Papers)*, 10 LEGAL WRITING: J. LEGAL WRITING INST. 23, 25–27 (2004); Robert J. Marzano, *Art & Science of Teaching/Writing to Learn*, 69 EDUC. LEADERSHIP 82 (2012).

[171] Linda L. Berger, *Applying New Rhetoric to Legal Discourse: The Ebb and Flow of Reader and Writer, Text, and Context*, 49 J. LEGAL EDUC. 156 (1999) [hereinafter Berger, *Applying New Rhetoric*]; Venter, *supra* note 162, at 632.

[172] Corbett, *supra* note 27, at 28.

who are trained to read compositions in a certain way.[173]

Within the New Rhetoric paradigm, some contend that this knowledge-shaping[174] is primarily within the individual,[175] while others contend this knowledge construction takes place within a social context.[176] So-called inner-directed New Rhetoricians "seek to discover writing processes that are so fundamental as to be universal," while so-called outer-directed New Rhetoricians believe thinking and language are each "a social construction."[177] Both are correct. The idea of "making meaning" through writing is both cognitively and socially constructed,[178] and this duality is evidenced in the concept of genre.[179] Interestingly, while law reviews summarize the large body of non-legal scholarship that attests to genre's influence in constraining writers and influencing readers and the resulting process of understanding the world,[180] the legal writing academy lacks such genre scholarship of its own texts and ignores the importance of genre bias in legal writing altogether.[181] One aim of this Article is to initiate such study so

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[173] *See* David Bartholomae, *Inventing the University*, *in* LITERACY: A CRITICAL SOURCEBOOK 403 (Ellen Cushman et al. eds., 2001).

[174] Berger, *Applying New Rhetoric*, *supra* note 171, at 157.

[175] *Id*.

[176] *Id.* at 158.

[177] *Id.*

[178] *Id.* (citing Linda Flower, *Literate Action*, *in* COMPOSITION IN THE TWENTY-FIRST CENTURY: CRISIS AND CHANGE 249 (Lynn Z. Bloom et al. eds., 1996)).

[179] *See* Richard M. Coe & Aviva Freedman, *Genre Theory: Australian and North American Approaches*, *in* THEORIZING COMPOSITION, A CRITICAL SOURCEBOOK OF THEORY AND SCHOLARSHIP IN CONTEMPORARY COMPOSITION STUDIES 136, 136 (Mary Lynch Kennedy ed., 1998).

[180] *See* Berger, *Applying New Rhetoric*, *supra* note 171, at 157–58 (discussing the knowledge shaping process); Linda L. Berger, *Studying and Teaching "Law as Rhetoric:" A Place to Stand*, 16 J. LEGAL WRITING 1 (2010) (focusing on the rhetorical process as central to understanding and perception) [hereinafter Berger, *Studying and Teaching*]; Kristen K. Robbins-Tiscione, *A Call to Combine Rhetorical Theory and Practice in the Legal Writing Classroom*, 50 WASHBURN L.J. 319 (2011) (discussing rhetorical processes for understanding the world).

[181] Attesting to this point, in her article making the point that genre analysis is applicable to legal documents, Sneddon cites one authority, *to wit*: PETER GOODRICH, OEDIPUS LEX: PSYCHOANALYSIS, HISTORY LAW 13 (1995)

that legal writers can be more effective writers.

Persuasion, the essence of legal writing, is intimately intertwined with the nature of the specific audience. So is genre.[182] In certain professions, such as the law, this intersection of genre and persuasion is particularly important because "persuasion . . . finds its realization through various genres."[183] Genre study examines (1) the persuasive functions of the text, particularly formal features; (2) the practices surrounding the document; and (3) the language employed.[184] Additionally, the study of genre considers the broader social action "performed by adhering to or resisting these formal features, analyzing the relationship between features and rhetorical action—the action that texts are employed to accomplish."[185] This idea of rhetorical action being employed to accomplish a goal is true in legal writing.

Lawyers may have a passive and unarticulated appreciation of genre bias but this is not enough. Lawyers must understand that genre bias enhances comprehension and creates meaning, thereby simultaneously constraining choices for writers and forcing texts into a set mold which controls readers' perceptions and reception of that text. Such is the yin and yang of genre. It needs to be central in the mind of the lawyer when she writes. As more specifically argued below, genre is a cognitive bias that matters to lawyers because (1) genre is a natural part of the human decision-making process and law is about decision making; and (2) genre is

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(asserting that law is a genre of rhetoric), and several other sources that examine the broader notion of rhetoric and law. Karen J. Sneddon, *In the Name of God, Amen: Language in Last Wills and Testaments*, 29 QUINNIPIAC L. REV. 665, 674 n.51 (2011) [hereinafter Sneddon, *In the Name of God*]. In arguing that law schools should embrace writing across the curriculum, Professor Parker brushes on the topic of genre in a section entitled "Writing Skills as 'Tools of the Trade,'" but only in a footnote. Carol McCrehan Parker, *Writing Throughout the Curriculum: Why Law Schools Need it and How to Achieve It*, 76 NEB. L. REV. 561, 580 n.73 (2004).

[182] PERSUASION ACROSS GENRES 11 (Helena Halmari & Tuija Virtanen eds., 2005).

[183] *Id*.

[184] *See* Miller, *supra* note 27.

[185] Dan L. Burk & Jessica Reyman, *Patents as Genre: A Prospectus*, 25 L. & LITERATURE. (forthcoming Fall 2013), *available at* http://ssrn.com/abstract=2298433; Yates & Orlikowski, *supra* note 2, at 301.

an essential ingredient in transactional documents and a vital part of every aspect of every brief, opinion, or other type of persuasive legal writing.[186] However, before delving into the specifics of legal writing genres, it is important to explore how, in general, professions internalize and perpetuate genres.

B. Professional Genres, Ceremonials, and Uptake: The Making of a Lawyer

Semotician Tzvetan Todorov observed that "[i]n a [given] society, the recurrence of certain discursive properties is institutionalized, and individual texts are produced and perceived in relation to the norm constituted by this codification. A genre, whether literary or not, is nothing but this codification of discursive properties."[187] These discursive properties are the components of genre, and the normative process described by Todorov occurs in all professions. Such professional genres are like Russian Nesting Dolls[188] with smaller sub-genres found within larger ones. This pattern is evident in all professional genres, from accountants to zoologists, and lawyers are no different.[189] Lawyers create legal arguments and documents within "the parameters of accepted formats,"[190] and so genre analysis should be (and is) implicit in legal writing textbooks.[191] However, law school legal writing programs don't engage in genre analysis[192] even though

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[186] *See infra* Part V.C.

[187] Tzvetan Todorov & Richard M. Berong, *The Origin of Genres*, 8 NEW LITERARY HISTORY 159, 162 (1976).

[188] *See* Sindling, *A Sermon in the Midst*, *supra* note 134, at 146.

[189] GIBBONS, *supra* note 17, at 131; Coe & Freedman, *supra* note 179, at 44.

[190] LEGAL WRITING HANDBOOK, *supra* note 18, at xxxiii.

[191] Sneddon, *In the Name of God*, *supra* note 181, at 674 ("Genre analysis is applicable to legal documents").

[192] *Cf.* Berger, *Applying New Rhetoric*, *supra* note 171, at 167 n.81 (citing Jessie C. Grearson, *Teaching the Transitions*, 4 LEGAL WRITING 57, 74–77 (1998)) (advocating that legal writing teachers need to do more than just introduce students to the conventions of the legal writing community). It is a paradox that legal writing programs do not *expressly* teach genre, as genres, when the entire process of law school can be seen as one meta-genre, with the study of case law genre as the primary tool. *See also* Mertz, *supra* note 16, at

genres are right there, hiding in the reeds.

For example, Professor Robert N. Cook's *Legal Drafting*, published in 1951, was the first textbook on legal writing, and offers 900 (now frail and yellowed) pages of specific forms of legal writing but never mentions the term "genre."[193] Cook does, however, offer a prescient note about the centrality of what this Article calls "genre bias." Cook states in his Rule 23 that as "the whole is, in the art of legal composition, antecedent to the parts," going on to explain that:

> This is a rule of importance in some other kinds of composition occasionally, but of special and invariable importance in legal composition.The draftsman should always and firmly grasp the whole law, deed, or pleading he is to draw, before he commences to draw any part. This may be done by skilled persons tacitly and almost unconsciously, as mental arithmetic by a skilled calculator.[194]

In other words, genre bias operates in legal writing.

A decade later, Professor Reed Dickerson provided a classic definition of legal writing that implied the importance of genre. He said that "[l]egal drafting is the crystallization and expression in definitive form of a legal right, privilege, function, duty [or] status. . . ."[195] More recently, in a book for international students studying American law, Professor Jill J. Ramsfield notes that legal writing genres "function in specifically designed settings," and she offers an entire chapter on various legal sub-genres.[196] In a delightful book analogizing the law to architecture as a legal writer is both artist and engineer, Ramsfield sets out the "situational elements" of legal writing as including "traditions" which lawyers

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82–83; Venter, *supra* note 162, at 629 ("Legal writing teachers want their students to master the conventions and genres of their discourse and to enter the legal community confident of their skills.").

[193] *See* ROBERT NEVIN COOK, LEGAL DRAFTING (1951); *see also* Robert N. Cook, *The Teaching of Legal Drafting*, 4 W. RES. L. REV. 299 (1952).

[194] COOK, *supra* note 193, at 32.

[195] REED DICKERSON, THE FUNDAMENTALS OF LEGAL DRAFTING 3 (1965).

[196] JILL J. RAMSFIELD, CULTURE TO CULTURE: A GUIDE TO U.S. LEGAL WRITING 7–8 (2005).

are "expected to honor."[197] Zeroing in on genre bias, without using the term, Ramsfield declares that "[i]n each writing situation, you may be expected to exercise certain analytical choices derived from forms or patterns developed within the legal community. You learn these methods in law school, but your repertoire continues the increase afterward."[198]

In 2004, University of Wyoming College of Law Professor Michael R. Smith authored a comprehensive law review treatment of legal writing genres, addressing genre as taxonomy rather than from a rhetorical or socio-cognitive perspective.[199] Smith identifies the categories of legal writing as (1) analysis writing, (2) legal drafting, and (3) critical analysis writing.[200] Although Smith does not engage in genre analysis, his listing of these different genres of legal writing, and cataloging their application, is important to the study of genres as a cognitive bias in legal writing by cataloging their application. Without explicitly calling it genre bias, law professors Cook, Dickerson, Ramsfield and Smith each begin to point the path towards appreciation of the centrality of genre bias in legal writing.

However, beyond the law school gate and across the metaphorical quad into the actual world lies a well-marked path of legal writing genre scholarship.[201] According to one summary article, "[t]he legal genre, which has a well-established status in [Language for Specific Purposes] and sublanguage studies, includes a variety of texts and situational patterns."[202] Language for a specific purpose is simply language and culture study in

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[197] JILL J. RAMSFIELD, THE LAW AS ARCHITECTURE 7 (2000).

[198] *Id*.

[199] *See* Michael R. Smith, *Alternative Substantive Approaches to Advanced Legal Writing Courses*, 54 J. LEGAL EDUC. 119 (2004).

[200] *Id.* at 122–28.

[201] *See, e.g.*, GIROLAMO TESSUTO, INVESTIGATING ENGLISH LEGAL GENRES IN ACADEMIC AND PROFESSIONAL CONTEXTS (2012) (situating English legal language research in discourse and genre analytic framework by closely looking at the case note genre, the research article genre, and the book review academic genre).

[202] Conference Paper, Iwona Witczak-Plisiecka, Universidad de Zaragoza, The Relevance Theoretic Perspective on Legal Language (September 14–16, 2006), *available at* http://www.unizar.es/aelfe2006/ALEFE06/1.discourse/26..pdf.

specific disciplines, such as medicine, business, law, or other areas.[203] The summary article goes on to note that "[w]ithin the legal genre, there are 'internal' functional sub-genres, such as statutes, conventions, contracts with their numerous sub-categories, wills, case reports, etc., which have received considerable attention both in theoretical and theoretical-translation studies in the recent years."[204] For example, in 2003, Hong Kong Baptist University English Professor John Gibbons published a comprehensive analysis of legal language, including an extensive array of legal genres involved in the court system.[205] He breaks down appearance genre, case report genre, police interview genre, guilty pleas genre, and several others, arguing that legal genres create a primary reality prescribing behavior and meaning.[206] English Professor Vijay K. Bhatia at City University of Hong Kong has also been particularly interested in genres within the legal discourse.[207] Bhatia defines genre as:

> [a] recognizable communicative event characterized by a set of communicative purpose(s) identified and mutually understood by the members of the professional or academic community in which it regularly occurs. Most often it is highly structured and conventionalized with constraints on allowable contributions in terms of their intent, positioning, form and functional value. These constraints, however, are often exploited by the expert members of the discourse community to achieve private intentions within the framework of socially

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[203] *See* Helen Basturkmen & Catherine Elder, *The Practice of LSP*, *in* THE HANDBOOK OF APPLIED LINGUISTICS 672 (A. Davies & C. Elder eds., 2004) ("LSP is generally used to refer to the teaching and research of language in relation to the communicative needs of speakers of a second language in facing a particular workplace, academic, or professional context. In such contexts language is used for a limited range of communicative events.").

[204] Witczak-Plisiecka, *supra* note 202, at 182.

[205] *See* GIBBONS, *supra* note 17.

[206] *See id.* at 130–31.

[207] *See* LEGAL DISCOURSE ACROSS CULTURES AND SYSTEMS (Vijay K. Bhatia et al. eds., 2008) [hereinafter LEGAL DISCOURSE ACROSS CULTURES].

recognized purpose(s).[208]

This scholarship also points the path to understanding what a lawyer is at his or her core. Generations of lawyers have been taught to "think like a lawyer" and more recently, lawyers have been trained to "write like a lawyer."[209] This Article contends that to realize the former, a lawyer must master the latter.[210]

Genres are forms of situated cognition, since how we think and how we act or write are related and operate as a feedback loop. In fact, sociologist Anthony Giddens notes the existence of a "recursive phenomenon in which, through our social practices, we reproduce the very social structures that subsequently make our actions necessary, possible, recognizable, and meaningful, so that our practices reproduce the very structures that consequently call for these practices."[211] Legal forms, like any genre element such as Devitt's grocery list,[212] are no different.[213]

Nested as systems within systems (previously described as similar to a set of Russian Nesting Dolls), genres not only interact in a recursive way in their professional with their constituent practices, but genres also relate and feedback into larger genre systems called *ceremonials*.[214] Summarizing the work of Anne Freadman,[215] English professors Anis S. Bawarshi and Mary Jo Reiff explain how genres are like "games" that take place within

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[208] BHATIA, ANALYSING GENRE, *supra* note 17, at 13.

[209] *See, e.g.*, John D. Feerick *Writing Like a Lawyer*, 21 FORDHAM URB. L.J. 381 (1993); Kathleen Elliot Vinson, *Improving Legal Writing: A Life-Long Learning Process and Continuing Professional Challenge*, 21 TOURO L. REV. 507 (2005).

[210] *See* Miller, *supra* note 27; *see also* Mark K. Osbeck, *What is "Good Legal Writing" and Why Does it Matter?*, 4 DREXEL L. REV. 417 (2012).

[211] BAWARSHI & REIFF, *supra* note 27, at 80 (citing ANTHONY GIDDENS, THE CONSTITUTION OF SOCIETY: OUTLINE OF THE THEORY OF STRUCTURATION (1986)).

[212] *See* DEVITT, *supra* note 36, at 23–24.

[213] *See* Davis, *supra* note 38.

[214] BAWARSHI & REIFF, *supra* note 27, at 84 (quoting Anne Freadman, *Anyone for Tennis?*, *in* GENRE AND THE NEW RHETORIC 43, 46 (Aviva Freedman & Peter Medway eds., 2003)).

[215] *Id.* (citing Freadman, *supra* note 214, at 43; Anne Freadman, *Uptake*, *in* THE RHETORIC AND IDEOLOGY OF GENRE: STRATEGIES FOR STABILITY AND CHANGE 39 (Richard M. Coe et al. eds., 2002)).

these "ceremonials."[216] (Linda Berger calls ceremonials a "problem-solving performance.")[217] Within those ceremonials, "genres constitute the rules for play for the exchange of texts . . . ."[218] Conveniently for lawyers, these non-lawyer genre scholars use the *ceremonial* of a trial to illustrate their point. A trial consists of several interrelated genres (jury selection, opening statement, direct, cross, closing, jury instructions, deliberation, and reading the verdict). Bawarshi and Reiff explain the operation of genre:

> Each of these moments is a genre, though it may be occupied by several texts, and each of the texts will deploy a range of tactics . . . . To understand the rules of the genre is to know when and where it is appropriate to do and say certain things, and to know that to do and say them at inappropriate places and times is to run the risk of having them ruled out. To use these rules with skill is to apply questions of strategy to decisions of timing and the tactical plan of the rhetoric.[219] [W]ithin the rules of the ceremonial, the various genres play off of each other in coordinated, consequential ways. And within the rules of the genre game, every text is a situated performance in which its speaker or writer plays off of the typified strategies embodied in the genre, including the sense of timing and opportunity.[220]

To play the game, you need to know the rules, and only an expert can meaningfully participate in this recursive phenomenon.[221] The ability to know how to negotiate genres, how to apply genres, and how to turn genre strategies into textual practices involves something called *uptake.*[222] Uptake is effectively

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[216] *Id.*

[217] Berger, *Applying New Rhetoric*, *supra* note 171, at 164.

[218] BAWARSHI & REIFF, *supra* note 27, at 84.

[219] *Id*. at 85 (quoting Freadman, *supra* note 214, at 43).

[220] *Id.*

[221] *See* Abner & Kierstead, *supra* note 44, at 366–69 (summarizing the difference between novice and expert lawyer cognition).

[222] BAWARSHI & REIFF, *supra* note 27, at 85 (citing Freadman, *supra* note

selection. As Freadman explains, uptake "selects, defines or represents its object . . . . This is the hidden dimension of the long, ramified, intertextual memory of uptake: the object is taken from a set of possibilities."[223] In other words, uptake is selection. "What we choose to take up and how we do so is the result of *learned recognition of significance* over time and in a particular context" that becomes habit.[224] Again, think of the simple grocery list and how its use becomes habit. Cognitively, this "learned recognition of significance" is a manifestation of the schema and prototype theories discussed earlier.[225] Broadly, it is the epitome of learning to think and write like a lawyer—it is the meta-genre of the profession.

Lawyers, like all experts, habitually select among possibilities—the essence of uptake. Linda Berger discusses uptake by other terms[226] citing cognitive research and noting that "[a]cross the board, experts show greater use of stored schemas [or, genres] and self-reflective techniques [or uptake], and they draw on a broader range of strategies appropriate to their domain."[227] Uptake or "self-reflective techniques" are processing professional cognitive chops. "Knowledge of uptake is knowledge of what to

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214, at 43).

[223] *Id.* at 86 (citing Freadman, *supra* note 214, at 43).

[224] *Id.*; *see also* Ann M. Johns, *Genre Awareness for the Novice Academic Student: An Ongoing Quest*, 41 LANGUAGE TEACHING 237, 241 (2008) ("When we read or write in a genre with which we are familiar, and for which we have a schema, we instantiate our schema for what typifies that genre, its conventions, as we read or write, and we use our knowledge of conventions as we produce a new text. The conventions of a genre can refer to a variety of features: the text structure, the register, the relationships between the writer and the audience, the uses of non-linear material (e.g., graphs or charts), the common fonts, and even the paper type and quality.").

[225] *See supra* Part IV.

[226] Berger, *Applying New Rhetoric*, *supra* note 171. Professor Berger's article pre-dates Freadman's work on uptake and, therefore, the differing terminology is understandable. That said Berger's discussion of New Rhetoric generally, and her discussion of expert-novice research in particular, fits four-square into Freadman's thesis. For that matter, Cook's Rule 23 implies uptake as well. *See supra* note 193 and accompanying text.

[227] Berger, *Applying New Rhetoric*, *supra* note 171, at 164 (alteration in original).

take up, how, and when, including how to execute uptakes strategically and when to resist expected uptakes."[228]

Bawarshi and Reiff conclude that "such genre uptake knowledge is often tacitly acquired, ideologically consequential, deeply remembered and affective, and quite durable, connected not only to memories of prior, habitual responses to a genre, but also memories of prior engagements with other, related genres."[229] Moreover, "genre uptake knowledge is also bound up in memories of prior experiences, relations with users of the genre, and a sense of one's authority within a ceremonial"[230]—in other words, a strong cognitive bias. Uptake is the key to legal writing because it is the process by which we learn to write like tax lawyers, or divorce lawyers, or patent lawyers and so forth. Indeed uptake, as the cognitive doorway that leads to genre bias, is central to the making of an effective legal writer.

C. Genre Bias in Transactional and Persuasive Legal Writing

Stepping back to look broadly at legal writing genres, legislation has the "status of [a] primary legal genre,"[231] the outermost nested Russian doll. Legislation "forms the basis and essence of all legal conceptualizations and practices,"[232] since the regulation of human affairs in a democracy is accomplished primarily through legislation. Legislative text is often characterized by precise, clear, and unambiguous expressions of certainty in legislative intent. To accomplish this goal, the legislative legal writing genre employs a "complex array of qualifications, often strategically positioned at syntactic points where they are unlikely to attract any ambiguous or unintended interpretation."[233] These aspects of legislative legal writing "form the basis of the underlying cognitive structuring"[234] in the legislative sentence.

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[228] BAWARSHI & REIFF, *supra* note 27, at 86.

[229] *Id.*

[230] *Id*.

[231] Bhatia, *Legal Genres*, *supra* note 16, at 1–2.

[232] *Id.* at 6.

[233] *Id*. at 2.

[234] *Id*. Other aspects of legislative genre that aid in accomplishing the purpose include nominalizing verbs.

Cases, the next encased doll, represent a sub-genre in the system of legal genres because they are derived from legislation. Here, the "system" of legal genres divides into "enabling genres," such as briefs and pleadings, and "target genres," such as deeds and contracts or simply "litigation" and "transactional." In his taxonomy, Smith describes them as "application analysis writing" and "legal drafting."[235] Within these legal spaces are the various specific sub-genres (or more dolls) where each such sub-genre represents "a typified communicative action invoked in response to a *recurrent situation*."[236]

A given genre (or sub-genre) that results from, and guides, a given recurrent situations is characterized by similar form and substance. Massachusetts Institute of Technology professors Joanne Yates and Wanda T. Orlikowski have devised a model for identification and analysis of genres in which they explain that "*form* refers to the observable physical and linguistic features of the communication[s]," such as text-formatting devices (i.e., agenda), "communication medium," and "language or symbol system.[237] *Substance*[238] is the typified response and "refers to social motives, themes and topics being expressed in the communication."[239]

This concept applies nicely to legal writing. For example, within the realm of transactional documents, typified responses

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[235] Smith, *supra* note 199, at 122–25.

[236] Yates & Orlikowski, *supra* note 2, at 301 (emphasis added). The Recurrent situations include the history and nature of the established practices, social relations, and communication media within the organization.

[237] *Id*. at 302.

[238] *Id.* at 301–02.

[239] *Id.* at 301. Yates and Orlikowski apply this methodology to the memo genre of internal business correspondence. They examine the history from the scant use of such memos until the later part of the nineteenth century, when "manufacturing firms mushroomed," leading to a need for written internal communications. *Id.* at 313. They examine the reasons for the memorandum over time and form elements including filing systems like vertical files. They turn to the introduction of email and how it both transformed the genre and was constrained by it. Genre analysis, they explain, "does not attempt to understand the practice as an isolated act or outcome, but as communicative action that is situated in a stream of social practices which shape and are shaped by it." *Id.* at 318.

take the form of, well, forms. Lawyers call these typified responses to recurrent situations "boilerplate." Judge Frank Easterbrook rightly concludes that "phrases become boilerplate when many parties find that the language serves their ends." Boilerplate is ubiquitous in transactional documents. In their recent book on boilerplate language, Professors Mitu Gulati and Robert E. Scott focus on the theories that explain the "stickiness of boilerplate" and echoing Judge Easterbrook, contend that boilerplate sticks for a host of reasons including familiarity, use by a network, pressure to avoid novel forms, organizational routine, and what the authors call "endowment effects."[240] The endowment effect is a cognitive bias that favors the status quo.[241] In other words, typified responses are such because they are treated as such.

The existence and resilience of boilerplate supports the claim that genre bias exists and matters. Application of the Yates and Orlikowski's *Recurrent Situation Yields Genre Defined By Form/ Substance* model to legal writing sub-genres reveals not only that these sub-genres are well-established, but also rounds out the thesis that genre bias matters and supports the conclusion that lawyers should not break genre. It is to that application, this Article now turns.

1. Examples of Transactional Legal Writing Sub-Genre: Patent Application and Wills

There are drafters and litigators—a dichotomy fostered in law school classrooms[242] and lived out, coast to coast, in boardrooms, conference rooms, and courtrooms. Although much more of the practice of law takes place in boardrooms and conference rooms than in courtrooms,[243] law school legal writing programs continue

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[240] *See* MITU GULATI & ROBERT E. SCOTT, THE THREE AND A HALF MINUTE TRANSACTION: BOILERPLATE AND THE LIMITS OF CONTRACT DESIGN (2013). Endowment effects overlap with what is called here genre bias.

[241] *See* William Samuelson & Richard Zeckhauser, *Status Quo Bias in Decision Making*, 1 J. RISK & UNCERTAINTY 7, 36 (1988).

[242] Celeste M. Hammond, *Integrating Doctrine and Skills in First-Year Courses: A Transactional Attorney's Perspective*, 17 J. LEGAL WRITING INST. 409, 409–13 (2011).

[243] *See* Marc Galanter, *The Vanishing Trial: An Examination of Trials and*

to treat transactional legal writing as the forgotten child.[244] Not surprisingly, the same is true with regard to genre analysis of transactional legal discourses. Few published works discuss the genre of transactional documents. Indeed, existing scholarship merely reveals that transactional legal writing demonstrates a conservative, highly structured set of conventions with a high proportion of standard formulae favoring archaic expressions, complex patterns of syntax, specialized terminology, and endless repetition resistant to change. Transactional legal writing is also a sub-genre that punishes those who transgress its boundaries.[245] While some claim that demanding adherence to the genre is a way for those in control to monopolize knowledge, linguistic scholars rightly argue that "the overall purpose of this type of discourse is to promote clarity and certainty within the professional community."[246] Turning to two types of transactional document genres, patent applications, and wills we can explore how these highly structured, formal genres function in the real legal world.

University of California at Santa Barbara Professor Charles Bazerman, a founder in the field of genre studies, did some of his pioneering work by analyzing the U.S. patent application.[247] From his study, we can glean the general principles applicable to transactional legal genres. Looking at the history of patent applications, the forms, and the process of granting the application, Bazerman finds "a complex web of interrelated genres where each

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Related Matters in Federal and State Courts, 1 J. EMPIRICAL LEGAL STUD. 459 (2004).

[244] Hammond, *supra* note 242, at 409–14.

[245] Bridgitte Norlyk, *Conflicts In Professional Discourse: Language, Law and Real Estate*, *in* ANALYZING PROFESSIONAL GENRES 163, 168 (Anna Trosbord ed., 2000). Over the past 20 years or so the Plain Language Movement has tried to address the structured conventions of transactional legal writing by making legal language more accessible to non-lawyers. *See* Julie A. Baker, *And the Winner Is: How Principles of Cognitive Science Resolve the Plain Language Debate*, 80 UMKC L. REV. 287, 288–95 (2011) (concluding that plain language does not mean simple language, necessarily, and that an effective legal writer chooses language from across the spectrum "to achieve credibility and persuasive force").

[246] Norlyk, *supra* note 245, at 168 (citing BHATIA, ANALYSING GENRE, *supra* note 17).

[247] *See, e.g.*, CHARLES BAZERMAN, CONSTRUCTING EXPERIENCE (1984).

participant makes a recognizable act or move in some recognizable genre, which then may be followed by a certain range of appropriate generic responses by others."[248] As Bawarshi and Reiff elaborate in their comprehensive book on genre:

> Bazerman suggests that a genre system includes genres from multiple genre sets, over time, and can involve the interaction of users with different levels of expertise and authority, who may not all have equal knowledge of or access to all the genres within the system. Yet, the relationship of the genres to one another, coordinated through a series of appropriately timed and expected uptakes, enables their users to enact complex social actions over time—in this case, enabling the approval or denial of a patent grant.[249]

Echoing Bazerman's conclusion, without citing him, practitioner Scott W. Cummings describes the genre of the patent application process, in a publication for the American Intellectual Property Law Association as "daunting." The patent genre is myriad substantive and formal legal requirements because patent applications are "ideally written with an extremely diverse audience in mind: the inventor(s); the patent office examiner; IP counsel/tech transfer; investors; CEOs and other corporate officers; prospective licensee(s); potential infringer(s); and IP litigators (both hostile and friendly)."[250] Cummings also lists nine distinct aspects of the patent genre.[251] Without using the term "genre,"

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[248] Charles Bazerman, *Systems of Genres and the Enactment of Social Intentions*, *in* GENRE IN THE NEW RHETORIC 79, 96–97 (Aviva Freedman & Peter Medway eds., 1994).

[249] BAWARSHI & REIFF, *supra* note 27, at 88.

[250] Scott W. Cummings, *An Overview of Application Drafting and Provisional Applications*, AIPLA (August 2009), *available at* http://www.aipla.org/Test Document Library/2010/pppt/Cummings_Paper.pdf.

[251] *Id*. at 3. Those elements are: (1) describe the invention adequately so that one skilled in the art can understand and practice it; (2) disclose the best mode for carrying out the invention; (3) describe all features that may be necessary to support a claim that distinguishes the invention from the prior art; (4) claim the invention narrowly enough to avoid the prior art; (5) claim the invention broadly enough to prevent competitors from designing around the patent; (6) claim the invention clearly enough to put the public on notice as to

Cummings essentially describes the Patent Application genre and how it habituates uptake, which "inform[s] our expectations and intentions as we encounter, experience, and negotiate the seams between genres."[252]

Estate planning documents constitute another transaction document sub-genre. In a pair of recent articles, Mercer University School of Law legal writing professor Karen J. Sneddon offers a comprehensive discussion of the importance of genre bias in estate planning documents and the issues raised by violating that genre.[253] She notes that:

> Wills are a stable genre where the language must be substantively operative and accurate. One seemingly innocuous word change can alter the meaning of a bequest and can trigger a series of unintended consequences. This has led to the replication of the form and substance of wills for hundreds of years. And yet, while there are identifiable characteristics of the genre of wills, wills are not mere mechanized copies of documents drafted decades ago. Each will is unique. "For the writer-craftsman the genre serves as an external template, but the great artist awakens the semantic possibilities that lie within it." Each document in a genre, including the genre of wills, involves "a great deal of individual choice, for not every aspect of every text is specified by any genre. Within any genre, there is a great deal of 'free' variation." Each reviewed will acknowledges the expected form and

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what the applicant considers to be their property; (7) contain only factually accurate statements in order to avoid charges of lack of enforceability due to inequitable conduct; (8) satisfy the requirements for patentability of various countries around the world; and (9) tell a good story. *Id.*

[252] BAWARSHI & REIFF, *supra* note 27, at 90.

[253] *See* Sneddon, *In the Name of God*, *supra* note 181 (using rhetorical artifacts to detect the features, utility, and objectives of the genre of wills in estate planning); Karen J. Sneddon, *Speaking for the Dead: Voice in Last Wills and Testaments*, 85 ST. JOHN'S L. REV. 683 (2011) [hereinafter Sneddon, *Speaking for the Dead*] (examining the independent voice in wills, and the role and significance of accurate and operative wills).

> substance of the genre. And yet, each will also acknowledges the needs of a particular individual testator.[254]

Sneddon proceeds to identify the five preserved ritual characteristics that "form the core" of the will sub-genre: "(1) the lyrical title of 'Last Will and Testament,' (2) the invocation in the introduction, (3) the weighty gift, bequest, and devise of the rest, residue, and remainder; (4) the duty-laden nomination of executors and trustees; and (5) the resonating closing."[255] In this comprehensive treatment of a sub-genre, Sneddon demonstrates the socio-cognitive aspects of genre to which all lawyers need to be attuned. Sneddon's article should be a model for application to and analysis of other sub-genres, be they transactional documents and litigation documents.

2. Example of Litigation Sub-Genre: The Appellate Brief

Lawyers litigate. They have, for centuries, in courthouses on every corner of the globe. The lineage and ubiquity of this recurrent rhetorical situation offers fertile ground for genre analysis, yet scholarship is scant. The most extensive genre analysis of the litigation sub-genre is a hard-to-find book entitled *Legal Discourse Across Cultures and Systems*.[256] In the United States, Professor James Stratman delved into the effect of cognitive biases in connection with the specific litigation sub-genres. In

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[254] Sneddon, *In the Name of God*, *supra* note 181, at 686–87 (citation omitted).

[255] *Id*. at 694.

[256] *See generally* LEGAL DISCOURSE ACROSS CULTURES, *supra* note 207. The book was unavailable at any library in Illinois, which includes extensive collections at University of Chicago and Northwestern University. The library at Dominican University purchased the book for its collection at the request of the author. The book "investigates the linguistic and discoursal properties of legal documents used in international commercial arbitration contexts, focusing on their construction, interpretation, and use in international arbitration practice." *Id.* at vii. The growth in international trade and the resort to arbitration for resolution of the resulting disputes was the impetus for the project. In a chapter after chapter the authors explored the recurrent situations, the form and substance of the sub-genre of international commercial arbitration. *See generally id.*

1994, for example, Stratman explored the appellate brief sub-genre, seeking to understand the cognitive processes of both the writer (lawyer) and the reader (clerk and judge).[257] Summarizing earlier studies by Benoit,[258] Stratman concludes that appellate writers are more effective when their briefs provide the reader with what the reader expects.[259] Stratman's study affirms the primacy of genre in the persuasive process. Emphasizing cognitive-response theory[260] and citing Professor William Benoit's studies of argumentative strategies used before the Supreme Court,[261] Stratman notes the importance of the initial presentation of the argument to its ultimate success or failure.[262] Brief-readers' own memories (or schemata) influence their cognition, and the template that is the sub-genre of the appellate brief offers the surest, safest route to winning.

It is easy to see why Stratman's conclusions are true. As explained above, the Yates and Orlikowski's model looks first to the *recurrent situation.* With an appeal, the well-established practice in which the social relations between judge and attorney, and attorney and attorney, are highly proscribed. Within that community, communication is only through the written brief,

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[257] *See* James F. Stratman, *Investigating Persuasive Processes in Legal Discourse in Real Time: Cognitive Biases and Rhetorical Strategy in Appeal Court Briefs*, 17 DISCOURSE PROCESSES 1 (1994).

[258] William L. Benoit, *An Empirical Investigation of Argumentative Strategies Employed In Supreme Court Opinions*, *in* DIMENSIONS OF ARGUMENT: PROCEEDING OF THE SECOND SUMMER CONFERENCE ON ARGUMENTATION (J. Rhodes & S. Newell eds., 1981) [hereinafter Benoit, *An Empirical Investigation*]; William L Benoit, *Attorney Argumentation and Supreme Court Opinions*, 26 AUGMENTATION & ADVOCACY 22 (1989) [hereinafter Benoit, *Attorney Argumentation*].

[259] *See* Stratman, *supra* note 257, at 15.

[260] Cognitive response theory emphasizes the causal role the argument receiver's own thought processes may play in persuasion. *See* Anthony G. Greenwald, *Cognitive Learning, Cognitive Response to Persuasion, and Attitude Change*, *in* PSYCHOLOGICAL FOUNDATIONS OF ATTITUDES 147, 149 (1968) (measuring the relationship between persuasion, learning, and retention).

[261] *See* Benoit, *An Empirical Investigation*, *supra* note 258, at 179; Benoit, *Attorney Argumentation*, *supra* note 258, at 22.

[262] Stratman, *supra* note 257, at 15.

followed by oral argument, then ending with a written opinion.[263] The *form* and *substance* of each step is highly structured, such that failure to follow the prescriptions can result in dismissal of the case entirely.[264] The form of the appeal requires "observable physical and linguistic features of the communications,"[265] which are set by court rules[266] in many cases, and violation of those rules is grounds for rejection of the text entirely. Judge Richard Posner put it this way: "We are not sticklers, precisians, nitpickers, or sadists. But in an era of swollen appellate dockets, courts are entitled to insist on meticulous compliance with rules sensibly designed to make appellate briefs as valuable an aid to the decisional process as they can be."[267]

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[263] *See The Appeals Process*, U.S. COURTS, http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/HowCourtsWork/TheAppealsProcess.aspx (last visited Oct. 19, 2013).

[264] For example, in *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1998), the Court held that the use of "et al." in the notice of appeal was insufficient to confer jurisdiction and dismissed the appeal, even though it was obvious that the appellant intended to appeal the entire lower court decision. *Id*. at 317–18. In a strong defense of the importance of the rules, and implicitly following the established genre, Justice Scalia wrote in his concurrence:

> The principle that "mere technicalities" should not stand in the way of deciding a case on the merits is more a prescription for ignoring the Federal Rules than a useful guide to their construction and application. By definition all rules of procedure are technicalities; sanction for failure to comply with them always prevents the court from deciding where justice lies in the particular case, on the theory that securing a fair and orderly process enables more justice to be done in the totality of cases.

Id. at 319 (Scalia, J., concurring).

[265] Yates & Orlikowski, *supra* note 2.

[266] For example, Rule 32 in the Federal Rules of Appellate Procedure, specifies such matters as size limitations, the manner of reproduction, the binding, the cover, and the signature. FED. R. APP. P. 32. The requirements set forth in Rule 28(a) are mandatory, and noncompliance warrants dismissal of the appeal. FED. R. APP. P. 28(a); *see also* Sioson v. Knights of Columbus, 303 F.3d 458, 459–60 (2d Cir. 2002) (requirements set out in Rule 28(a) are mandatory); Ernst Haas Studio, Inc. v. Palm Press, Inc., 164 F.3d 110, 112 (2d Cir. 1999) (declining to reach into merits of case because appeal's main contention was frivolous).

[267] Avitia v. Metro. Club of Chi. Inc., 49 F.3d 1219, 1224 (7th Cir. 1995).

The substance of the appeal is also constrained. The motives of the actors are always the same: the appellant wants reversal, the appellee wants affirmation, and the court wants to get it right. Each of their respective communications is penned with this "given" in mind and read accordingly. But is there a choice to do otherwise and be a maverick?

3. Bucking the Bias by Breaking the Genre

a. General Rule: Don't Break the Genre

Recommendation: in transactional documents, don't ever break the genre. It is that simple. With regard to litigation documents like appellate briefs, the answer is a bit modified: don't ever break the genre, unless there is a very compelling reason.

Pause. Here is why. Breaking the genre comes with risk—risk because you as a writer are thwarting the expectations of your reader. Think of the mystery book that ends without resolution,[268] the fairytale in which the main characters do not live happily ever after,[269] or the action film where the star is killed in the middle of the story, while walking out of a bathroom.[270] Each exemplifies a case where the author broke the genre—bold, yes, but effective? Maybe not. The consequence of this authorial choice is usually reader frustration,[271] or disappointment,[272] or simply obscurity of

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[268] *E.g.*, TANA FRENCH, IN THE WOODS (reprt. ed. 2008) (writing her debut book, French concludes a murder mystery investigation with the discovery of an item, the meaning of which is inconclusive to the reader).

[269] For example, *The Juniper Tree* by the Brothers Grimm offers a tale of murder, cannibalism, and decapitation. *See* JACOB GRIMM & WILHELM K. GRIMM, THE JUNIPER TREE: AND OTHER TALES FROM GRIMM 316 (Lore Segal & Randall Jarrell trans., 1973).

[270] *See* PULP FICTION (Miramax Films 1994).

[271] Steve Fuller, an Amazon.com reviewer of *In the Woods*, wrote a review typical of other readers' feelings. Fuller wrote:

> Spoiler: To me, it's unforgivable to write a mystery novel in which the mystery isn't resolved . . . . The unforgivable part is creating a secondary mystery (which, to me, became the primary mystery) that is left completely unresolved. I've never been so angry. I felt betrayed. Which is the sad part, because other than that monumental betrayal, I loved French's writing

the work,[273] although there are exceptions. Viewers of *Pulp Fiction* may have been left bewildered when, in the middle of the movie, Butch Coolidge shoots Vincent Vega, who is coming out of the bathroom, but the movie won an Academy Award.[274] Similarly, while *In the Woods*'s non-resolution frustrates readers, critics nonetheless love it.[275]

Therefore, the general rule is then: do not break the genre unless there is a powerful reason to do so, and you are uniquely positioned by the situation and your skill to effect the move successfully. This is because "genres function simultaneously as premises to arguments and as metaphors for thinking."[276] For example, consider that the "cross-examination" genre functions as "a cognitive instrument for doing the rhetorical and pragmatic work of text production and interpretation, work that results both in a greater understanding of the 'cross-examination-ness' of a particular legal text and the possibilities and constraints of the

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style.

Steve Fuller, Comment to *In the Woods* Customer Reviews, AMAZON (February 7, 2012), http://www.amazon.com/gp/cdp/member-reviews/A2VY8CO6V76Q3/ref=cm_pdp_rev_title_1?ie=UTF8&sort_by=MostRecentReview#R2Q8KK23HXFCO.

[272] Another reviewer of *In the Woods* wrote, "No, I don't think every novel has to conclude with everything nicely tidied up, but when I turned the last page I was just left with a feeling of disappointment." Avid Reader, Comment to *In the Woods* Customer Reviews, AMAZON (August 12, 2007), http://www.amazon.com/review/R33KVH8W2927C6/ref=cm_srch_res_rtr_alt_3.

[273] *Juniper Tree* has yet to be made into a Disney cartoon, and likely won't be. *See* Stacy Conradt et al., *8 Fairy Tales and Their No-So-Happy Endings*, MENTAL FLOSS (Dec. 14, 2007, 11:30 AM), http://mentalfloss.com/article/17601/8-fairy-tales-and-their-not-so-happy-endings.

[274] Pulp Fiction won the 1995 Academy Award for Best Original Screenplay. *Awards for Pulp Fiction,* IMDB, http://www.imdb.com/title/tt0110912/awards?ref_=tt_awd (last visited Oct. 19, 2013).

[275] *In the Woods* won numerous awards for Best First Novel. *See Barry Awards*, DEADLY PLEASURES, http://www.deadlypleasures.com/barry.html (last visited Sept. 13, 2013); *History of Guests of Honor and Anthony Award Winners*, BOUCHERCON WORLD MYSTERY CONVENTION, http://www.bouchercon.info/history.html (last visited Sept. 13, 2013); *Macavity Awards*, MYSTERY READERS INTERNATIONAL, http://www.mysteryreaders.org/macavity.html (last visited Oct. 19, 2013).

[276] Kamberelis, *supra* note 23, at 157.

cross-examination genre."[277] Genres are persuasively powerful because they paradoxically explain texts, but not fully. Genres channel readers' minds. Like metaphors, genres "lead us to perceive that similarity in the midst of and in spite of difference."[278] The effectiveness of genres lies, therefore, not so much in their cognitive "powers of classification but in their powers of clarification and generativity."[279] That is, genres are not just buckets into which we place different types of texts, but more important genres help us understand, and stimulate thought—and that is genre bias.

There is an important distinction when considering the recommendation of whether to break the genre with respect to transactional documents as opposed to litigation documents. Pleadings, briefs and the like are generally temporary, single-purpose, finite writings. Such documents either work for the intended audience in the moment, or they do not, and then the litigants and judges move on. In this way, the litigation legal writing sub-genre is akin to a pitch in a baseball game. The pitcher attempts to persuade the batter to swing and miss, hit a ground ball, or take the pitch looking as the umpire yells "strike three." The audience and the rhetorical situation are clearly defined. Similarly, momentary in its essence, the litigation document's purpose happens then fleets.

By contrast, transactional documents are most often not grounded in a moment or circumstance and their ultimate application and user often unknown. The contract drafted today could be relied on by unknown buyers years hence, as could the lease or promissory note. Wills, and many other transactional documents, are ambulatory—they amble through time. In this way, the transactional legal writing genre is more akin to a baseball stadium than a pitch thrown in that stadium. Built in 1914, Wrigley Field has played host to the likes of Ernie Banks, Kerry Wood, Gale Sayers, Dick Butkus, Paul McCartney, and even Patrick Kane.[280] The builders of this "Green Cathedral"[281] could not have

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[277] *Id.*

[278] *Id.* at 157–58 (quoting ADENA ROSMARIN, THE POWER OF GENRE 46).

[279] *Id.* at 158.

[280] The Cubs, Bears, a former Beatle, and even Blackhawks have all played

foreseen all the uses for their project, and yet today, a century after it was built, Wrigley proves functional, even exceptional. Similarly, the drafters of transactional documents, wills, leases, and the like are creating texts for unknown readers of an unknown time, in an unknown place, and for use in a to-be-determined situation.

The fleeting nature of persuasive documents and the enduring existence of transactional documents is a distinction that matters in deciding whether to break the genre. As demonstrated below, while there may be rare occasions where you can break the genre in a brief or other persuasive document, that circumstance never applies to transactional documents. The difference comes from the audience's knowledge and the rhetorical situation in which the text is used. With litigation documents, the audience—the judge—is known to the advocate, and the exact contours of the use of the text are known as well. Breaking the genre comes at great cost, but it may be worth it. That calculation can be made because the variables are known.

In contrast to the ephemeral nature of persuasive documents, in some cases, wills are being probated that were drafted decades ago by lawyers likely long dead. The works of legal writing, maybe from the hand of the long since dead, are now read and interpreted by judges and heirs not only unknown at the time of drafting, but who may not have even been born at the time the document was written.[282] The high degree of uncertainty as to when transactional

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at Wrigley Field, also known as the Friendly Confines. Also, soccer has seen its turn on the field, but this author is not a soccer fan so cannot cite to any player by name.

[281] For those who have experienced the Friendly Confines, there is no need to prove the point. For those unfortunate who have not, see PHILIP LOWRY, GREEN CATHEDRALS: THE ULTIMATE CELEBRATION OF ALL MAJOR LEAGUE BALLPARKS 54–58 (2006).

[282] Under Illinois law, original wills must be filed in the county in which the decedent was residing on the day of death within thirty days of death. 755 ILL. COMP. STAT. ANN. 5/6-1 (West 2010). A review of the January and February 2013 will filings in Lake County, Illinois Circuit Court by the author revealed ninety-seven wills filed in a range from the most recent dated two weeks prior to the decedent's death, to the joint and mutual will of Emmett and Carol Burdick who in 1970 executed a will in their home town of Beaver Dam, Wisconsin, a will that took effect forty-three years later. The average age of the

documents will "kick in" and who they will affect makes tinkering with the "rules of the game"—the genre — something to be left on lawyers' scroll of things "never done." Now that we have completed a general overview, let's dive into the two specific arenas of the legal writing sub-genres.

b. Breaking the Genre in Opinions, Briefs, or Other Pleadings

"Genres can be seen as constituting a kind of tacit contract between authors and readers."[283] While breaking a contract is often wrong, it is not always unwise.[284] So if genre is a contract, should a litigator break the genre in a brief or other pleading, or a judge break the genre in an opinion? Generally, the answer is *no*—but sometimes and rarely, the answer is *maybe*. Whether a lawyer should create that hurdle is a decision fraught with high risk, and yet pregnant with potential pay-off. The risk is outright rejection. The pay-off is standing out from the crowd and thereby grabbing the reader's attention, to some point otherwise lost in the ordinariness of the genre true text.

Breaking the genre can knock your entire argument off kilter. Famously, this happened in the landmark case *Roe v. Wade*,[285] when the male attorney for the State of Texas, commenting on his female opposing counsel, broke the oral argument genre by telling a joke. Jay Floyd opened his argument the following:

> MR. FLOYD: Mr. Chief Justice, may it please the Court:. [sic] It's an old joke, but when a man argues against two beautiful ladies like this, they are going

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filed wills was eleven years.

[283] Daniel Chandler, *An Introduction to Genre Theory*, http://www.aber.ac.uk/media/Documents/intgenre/intgenre.html (last visited Oct. 19, 2013). *See also* Sonia Livingstone, *The Rise and Fall of Audience Research: An Old Story with a New Ending*, *in* DEFINING MEDIA STUDIES: REFLECTIONS ON THE FUTURE OF THE FIELD 247–54 (Mark R. Levy & Michael Gurevitch eds., 2004) ("[D]ifferent genres specify different 'contracts' to be negotiated between the text and the reader . . . which set up expectations on each side for the form of communication . . ., its functions . . ., its epistemology . . ., and the communicative frame.").

[284] For an interesting discussion of the morality of breaching contracts, see Steven Shavell, *Is Breach of Contract Immoral?*, 56 EMORY L.J. 439 (2006).

[285] 410 U.S. 113 (1973).

to have the last word.[286]

"Painful silence" greeted the joke and Mr. Floyd "struggled to regain momentum throughout the argument, according to one observer."[287]

Mr. Floyd's example of breaking the genre represents clearly what not to do.[288] Rarely, however, breaking the genre can have a powerful positive effect in the right context. Exceptions also define the outer-boundaries of the rule. If you look to when the legal writing genre has been broken, two examples come to mind, and both, not so surprisingly, are dissenting opinions. The sub-genre of the judicial opinion is well-established.[289] One example of breaking the judicial genre is Chief Justice Roberts' dissent from the grant of certiorari in *Pennsylvania v. Dunlap*,[290] which he began as follows:

> North Philly, May 4, 2001. Officer Sean Devlin, Narcotics Strike Force, was working the morning

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[286] Transcript of First Oral Argument at 15, Roe v. Wade, 410 U.S. 113 (1973) (No.70-18).

[287] Geoffrey Sant, *8 Horrible Courtroom Jokes and Their Ensuing Legal Calamities*, SALON (July 26, 2013, 2:42 PM), http://www.salon.com/2013/07/26/8_horrible_courtroom_jokes_and_their_ensuing_legal_calamity/.

[288] One commentator, Josiah Jenkins, even speculates that this misstep played a role in the case going against the state. *Life of the Law: Episode 5, Tough Crowd* (Jan. 15, 2013), http://www.lifeofthelaw.org/breaking-down-the-law-episode-5-how-to-survive-an-irs-audit/ ("[T]he most amazing thing is not just how bad the joke was, but how bad it was for the setting. Arguing in 1971, in the midst of a cultural revolution, Jay Floyd should have done everything he could to downplay abortion as women's rights issue. Instead he highlighted gender roles and in all the wrong ways. *Roe v. Wade* would actually be argued a second time, and that time Jay Floyd wouldn't get to represent the state. Jane Roe's lawyer had been too unfocused on the first argument, but she came ready on the second trip and found an argument that would persuade the court. In essence, with his corn-pone humor, Jay Floyd ruined the state's best opportunity for a knock-out blow.").

[289] *See* GEORGE, *supra* note 18, at 331–58 (discussing judicial opinion genre); Hafner, *supra* note 16 (clarifying that the genre of judicial opinions is prevalent). *See generally* Tarja Salmi-Tolonen, *Persuasion in Judicial Argumentation: The Opinions of the Advocates General at the European Court of Justice*, *in* PERSUASION ACROSS GENRES (Helena Halmari & Tuija Virtanen eds., 2005).

[290] 555 U.S. 964, 964 (2008) (Roberts, J., dissenting).

> shift. Undercover surveillance. The neighborhood? Tough as a three dollar steak. Devlin knew. Five years on the beat, nine months with the Strike Force. He'd made fifteen, twenty drug busts in the neighborhood.
>
> Devlin spotted him: a lone man on the corner. Another approached. Quick exchange of words. Cash handed over; small objects handed back. Each man then quickly on his own way. Devlin knew the guy wasn't buying bus tokens. He radioed a description and Officer Stein picked up the buyer. Sure enough: three bags of crack in the guy's pocket. Head downtown and book him. Just another day at the office.[291]

Sounding more like novelist Raymond Chandler,[292] Roberts shattered the genre of what a Supreme Court opinion statement of facts should be.

Another example comes from U.S. Court of Appeals for the Ninth Circuit Chief Judge Alex Kozinski, who penned a stinging dissent to a court opinion upholding the conviction of Juan Ramirez-Lopez for smuggling illegal immigrants.[293] His dissent was structured as a conversation between the losing lawyer and the client, Mr. Ramirez-Lopez. The lawyer explained how the trial was fair, and the dissent, with a heaping dose of sarcastic dialogue, made clear the error of the majority. The U.S. Department of Justice dropped all charges and released the defendant, avoiding express acknowledgment of the push from Kozinski's dissent.[294] This is a prime, and rare, example of where breaking genre is actually effective. What credit goes to the logic of the dissent, and what credit goes to the fact that he broke the genre may never be known, but what is clear is that the dissent was very unusual; so

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[291] *Id.*

[292] *See* Mark Sherman, *Chief Justice Channels His Inner Raymond Chandler*, USA TODAY (Oct. 15, 2008), http://usatoday30.usatoday.com/news/washington/2008-10-14-3790306095_x.htm.

[293] United States v. Ramirez-Lopez, 315 F.3d 1143, 1159 (9th Cir. 2003), *withdrawn*, 327 F.3d 829 (9th Cir. 2003).

[294] *See* Henry Weinstein, *Appeal Lost, Yet Freedom Won*, L.A. TIMES (April 23, 2003), http://articles.latimes.com/2003/apr/23/local/me-free23.

was the Justice Department's response—some causation is certain.

While judges like Roberts and Kozinksi may take license with opinion sub-genre, there are at least three strong reasons why lawyers should carefully weigh the high costs against any possible benefit before doing so. First, judges are busy.[295] Dockets are packed. Putting before a judge a brief that confounds the genre also confounds the judge. As one commenter noted, brief readers expecting "specific information in specific places" would find it "frustrating to look throughout the brief to find" that information.[296]And frustrated readers are less persuadable readers.[297]

For example, take the case of *Custom Vehicles, Inc. v. Forest River, Inc.*[298] involving the "motion to strike" portions of the opponent's brief. U.S. Court of Appeals for the Seventh Circuit Chief Judge Frank Easterbrook denied the motion and, in doing so, powerfully endorsed the reason to stick with the established appellate genre proscriptions. His frustration pervades the opinion. He wrote, "[o]ne can search the Federal Rules of Appellate Procedure in vain without finding any provision for a 'motion to strike' whole document, let alone to strike sentences out of briefs."[299] The lawyer, who took the risk, lost the gamble. Judge

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[295] Not just judges for that matter. Opposing lawyers, clients and co-counsel read legal documents and they are busy, too. *See* RICHARD K. NEUMANN, JR., LEGAL REASONING AND LEGAL WRITING: STRUCTURE, STRATEGY AND STYLE 52 (5th ed. 2005) ("[T]he legal reader is a busy person, must read quickly, and cannot afford to read twice.").

[296] *Legal Brief Genre Analysis*, JASON D. MACLEOD, http://www.jasondmacleod.com/legal-articles-2/legal-genre-analysis/.

[297] Sean Flammer, *Persuading Judges: An Empirical Analysis of Writing Style, Persuasion, and the Use of Plain English*, 16 J. LEGAL WRITING INST. 183, 184 (2010); *see also* Baker, *supra* note 245, at 298 ("Research has shown that where people are unfamiliar with the truth of a statement, fluency is one factor that the mind considers.").

[298] 464 F.3d 725 (7th Cir. 2006).

[299] *Id*. at 726–27. Judge Easterbrook continued:

> [D]espite the fact that motions to strike portions of briefs are not authorized by the rules and are not only unnecessary (from the parties' perspective) but also pointless (from the judiciary's), they are filed all the time. I see about one such motion during each week that I act as motions judge. I have

Easterbrook subtracted from the movant's reply brief the number of pages wasted on the "beyond the genre" motion to strike.[300]

Second, offering a brief outside the genre can engender a dose of dread and even offend the reader. There is strong research showing that delivering a text within a genre provides the reader with both emotional and cognitive pleasure.[301] This pleasure is derived in part from the reader knowing where the text is going and having those expectations fulfilled.[302] Expectations unmet lead to frustration. Professor of communication and the director of the Annenberg Public Policy Center at University of Pennsylvania Kathleen Hall Jamieson explains it this way:

> When the rhetorical parameters established by the generic tradition are overstepped, reaction is provoked. One element in the implied contract between rhetoric and audience is a clause stipulating that that he fulfill rather than frustrate the expectations created for the audience by existing genre.[303]

More recently, Henry Jenkins, Provost's Professor of Communication, Journalism, and Cinematic Arts at University of California at Los Angeles, summarizing a thesis submitted by Alec Austin, reiterated that the violation of a genre is a violation of a

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> never granted such a motion (and never will); I don't believe that any of my colleagues grants such motions; yet the flow continues.

Id.

[300] *Id*. at 727.

[301] Chandler, *supra* note 284 (citing Stephen Neale, *Questions of Genre*, *in* APPROACHES TO MEDIA: A READER 460 (Oliver Boyd-Barrett & Chris Newbold eds., 1990)).

[302] *Id.* (citing NICHOLAS ABERCROMBIE, TELEVISION AND SOCIETY, 43 (1996)); *see also* Ashley Rexford, *A Meditation on the Effects of Genre*, ULOOP (Jan. 23, 2013), http://ucdavis.uloop.com/news/view.php/64294/a-meditation-on-the-effects-of-genre ("If the book we are reading violates these expectations, we feel violated as readers. Our trust has been betrayed, and we are left wondering why this book is labeled in such a way if it is not doing the job intended for it to do.").

[303] Kathleen M. Hall Jamieson, *Generic Constraints and the Rhetorical Situation*, 6 PHIL. & RHETORIC 162, 167 (1973) [hereinafter Jamieson, *Generic Constraints*].

contract between writer and reader.[304] Such a violation of genre generally leaves the reader with three choices in an attempt "to redress perceived contract violations:" first there is dissatisfaction, which manifests itself in lessened engagement; second, there is withdrawal, which is evidenced in the loss of the audience member as a viewer; or finally there is an audience boycott, which manifests itself in a reader actively trying to dissuade others from supporting or engaging with a text.[305]

These three negative outcomes of breaking the genre are particularly true with lawyers who submit writings that violate the proper genre because lawyering, even more than the arts, is a profession that privileges standardization. As Gibbons points out, "it is not in the interest of lawyers to produce new wordings because it may expose them to challenge"[306] and "[t]hat is the fear that freezes lawyers and their language. It is precise now. We are safe with it now. Leave us alone. Don't change. Here we stay till death or disbarment."[307] Lawyers pay heed; genre flouters foster frustration.

All the research cited above counsels against breaking the genre. In the only published study of its kind, Stratman methodically studied how cognitive biases may develop in brief writers, how those biases may affect their generation and strategic assessment of persuasive techniques, and how the readers (law clerks and judges) may react in initial and subsequent readings of the brief.[308] In that study, Stratman first found that the brief reading played a pivotal role in appellate court decision-making. Stratman cited two stages of the reading: the initial reading and then a reflective reading when the judge is writing the opinion.[309]

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[304] Henry Jenkins, *Genre Theory and Implicit Contracts*, CONFESSIONS OF AN ACA-FAN: THE OFFICIAL BLOG OF HENRY JENKINS (May 4, 2007), http://henryjenkins.org/2007/05/genre_theory_and_implicit_cont.html.

[305] *Id*.

[306] GIBBONS, *supra* note 17, at 23–24 (quoting MELLINKOFF, *supra* note 17, at 295).

[307] *Id*. at 24 (quoting MELLINKOFF, *supra* note 17, at 295).

[308] *See* James F. Stratman, *Investigating Persuasive Processes in Legal Discourse in Real Time: Cognitive Biases and Rhetorical Strategy in Appeal Court Briefs*, 17 DISCOURSE PROCESS 1 (1994).

[309] *Id*. at 15, 49.

Without discussing genre per se, Stratman explored the vital role that the argument-receiver's own thought processes play before, during, and after initial exposure to the argument.[310] A brief-reader's cognition is highly influenced by what "the receiver is thinking when a message is first presented, and the amount and kind of thinking that the receiver may use to evaluate the message upon initial presentation, may be equally important as any rhetorical technique used in the message medium itself."[311] In other words, first impressions matter. And while a certain level of surprise in a story—called a *narrative rug pull*—can be entertaining, it is not persuasive.[312]

Even worse than merely frustrating your reader, breaking genre may even boomerang. By way of example, in an appeal brought by this author seeking to reverse a post-decree change of custody, the central issue was the importance of stability and the need for the children to stay in their longtime hometown. The conclusion in the reply brief was simply this:

> Family Courts frequently and rightly talk about the importance of stability for a child. Children talk about it too. A child's home is his source of comfort and stability. In a collection of poems written by children entitled Home Sweet Home, Michael, age 9, says it simply:
>
> *My room is blue, it's real cool,*
> *It keeps me safe at night.*
> *I never fight.*
> *I like my bike.*
> *I like to fly a kite.*
> *But most of all,*
> *I like my room.*
> *And now I say goodnight.*

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[310] *Id*. at 18–42.

[311] *Id*. at 15 (citing R. Perloff & T. Brock, *And Thinking Makes It So: Cognitive Responses to Persuasion*, *in* PERSUASION: NEW DIRECTIONS IN THEORY AND RESEARCH 74–76 (M. Roloff & G. Miller eds., 1980)).

[312] Vera Tobin, *Cognitive Bias and the Poetics of Surprise*, 18 LANGUAGE & LIT. 155, 157 (2009) (explaining that surprise in a story works because it plays on the reader's "curse of knowledge"—a cognitive bias, that allows readers to over-generalize, and then be surprised by the narrative rug-pull).

> Ottawa was T's home. Ottawa was D. Jr.'s home. The children should have stayed in their home unless demonstrable detriment was alleged and proven. Here, the trial court expressly chose not to apply the detriment standard. And, still, the trial court ordered the children away from their home. It should not have done that. A remand is called for.[313]

The California Court of Appeals appeared offended. In its conclusion denying the appeal, the court wrote:

> In arguing the court erred by not applying the detriment standard [appellant] relies on secondary sources, and even poetry, on the importance of stability in children's living arrangements . . . . It remains, however, that in addressing [appellant's] argument the court was required to follow established legal precedent. We find no error . . . .[314]

To be sure, a brief can be written in narrative form because a story is an accepted in the genre. But verse may go too far afield for some judges. As Santa Clara University School of Law professor Stephen Smith notes, "[w]hen poetic form appears in obvious ways in a piece of legal writing, it is without question a curiosity and, perhaps, an object of ridicule. A brief should rarely, if ever, be a poem."[315] And at least in one California Court of Appeals, a brief should rarely, if ever, recite one either.

The third, and most important, reason not to break the genre is that doing so lessens the cognitive, and therefore, persuasive effects of genre bias. As discussed above, genre bias can be used to your advantage. Genre is a cognitive "spoon full of sugar" that makes it easier to swallow the weighty argument. That is, genre bias is a palliative device that makes a difficult reading a little less unpleasant, and an already pleasant reading even more so. Why would you, as a writer, ever forsake that advantage?

If a litigator breaks the proscribed genre he or she should likely

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[313] Appellant's Reply Brief at *8–9, Geiger v. Geiger, No. DO61114, 2012 WL 6178289 (Cal. App. 4th Feb. 12, 2012), 2012 WL 3117094.

[314] Geiger v. Geiger, No. DO61114, 2012 WL 6178289, at *6 (Cal. App. 4th Feb. 12, 2012).

[315] Stephen E. Smith, *The Poetry of Persuasion: Early Literary Theory and Its Advice to Legal Writers*, 6 J. ALWD 55, 55 (2009).

be prepared for the judge to wince and react with a level of frustration, anger, and repulse. Thus the decision of a legal writer to take this bold step should only be employed in circumstances where the following factors are present. First, the likelihood of winning the motion or case by staying within the genre is remote. Second, it is essential to get the judge's attention and stand out as not being a run-of-the-mill case. Finally, determine if the judge is going to be even remotely receptive to breaking the genre. Is this judge a stickler for rules, or is she receptive to presentation that is "outside the box?" For example, given Judge Easterbrook's general hostility to texts that vary from the rules, filing a brief with poetry before that court would prove foolish. By contrast, and perhaps most famously, at the turn of the twentieth century, then-attorney Louis Brandeis filed a brief in *Muller v. Oregon*[316] that broke the genre by relying on social science (110 pages of the brief) rather than legal precedent (two pages of the brief) to support his client's position.[317] Although his success in breaking the genre to create a new sub-genre that has become a "staple"[318] of Supreme Court practice, it establishes that there are ever-so-rare circumstances where breaking genre can be effective. Few of us, however, write like Louis Brandeis—very few.

c. Breaking the Genre in Transactional Documents

Never, ever, ever break the genre with a transactional document. As explained above, these documents are ambulatory and their ultimate application and users unknown. However, as Kristin Davis notes, not breaking the genre is different from blind adherence to a generic form.[319] In the only article to address the

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[316] 208 U.S. 412 (1908).

[317] Brief for the Appellant, Muller v. Oregon, 208 U.S. 412 (1908) (No. 107), 1908 WL 27605; *see also* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 100 (Kermit L. Hall et al. eds., 2d ed. 2005).

[318] *Id.* at 101.

[319] Davis, *supra* note 38, at 709 (citing Toledo Bar Ass'n v. Sawers, 903 N.E.2d 309, 310 (Ohio 2009) (holding that it was misconduct for a lawyer to use a generic trust document for a client and make no effort to adapt that document to the client's needs)).

question directly,[320] Sneddon urges lawyers to reject the strict strictures of the wills sub-genre by using language that personalizes the document and incorporates the testator's subjective "voice."[321] She raises some genre-analysis-related questions. What are the implications of an attorney drafting a will with conscious disregard to the established genre?[322] How will a will imbued with the subjectiveness of the testator's voice be received by the intended audience—heirs and judges?[323] Sneddon speculatively provides some answers, and her analysis is intriguing.

Ultimately, however, infusing a will with the testator's subjective voice is a risk better left untaken. As a practicing estate plan attorney, the author and his estate planning colleagues are always mindful that using established language and forms is nowhere more necessary than in estate planning. This sub-genre relies on an established entrenched understanding among attorneys and conveys the testator's present intent to the future decedent's audience—heirs and judges. The strong bias created by the entrenched sub-genre of wills counsels lawyers to religiously adhere to the genre. Sneddon's entreaty to tinker with that genre should be met with trepidation. The "understanding" that comes from reliance on the established sub-genre can have real-world consequences.

Recently in *Fifth Third Bank, N.A. v. Rosen*, in the context of litigation over the meaning of an estate plan, the Illinois Appellate Court spoke about the importance of adhering to genre, holding that the use of technical language governed.[324] At issue was the term "taxable estate," and the difference in interpretation of that could cost one side or the other millions of dollars.[325] The court noted that "[t]echnical terms with established meanings are presumed to be used according to their technical meanings" and lawyers who write documents are presumed to write within the

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[320] Sneddon, *Speaking for the Dead*, *supra* note 253.

[321] *Id.* at 696.

[322] *Id.* at 709–21.

[323] *Id.*

[324] 957 N.E.2d 956, 965 (Ill. App. Ct. 2011).

[325] *Id.*

genre.[326] The application of that view controlled the outcome of the case.[327] In the estate planning context more broadly, Gerry W. Beyer, cited by Sneddon, says as much:

> [W]ills contain standardized provisions, [so] the user may safely rely that the language of each form will be the same every time the form is used . . . . This uniformity allows the user to confidently predict the results that will flow from the use of the form. Past personal experience with the form, legislation, and judicial decisions assist the user in anticipating whether the will form will function as intended.[328]

Genre matters because it establishes the conventions upon which language is interpreted. What if the subjective voice of testator in *Rosen* were used in place of technical language? How would a court have been guided and constrained—or left to float untethered—because the scrivener wanted the testator or his family to be comforted by the will's words? It is better for the client to put what will be remembered as his or her emotional final thoughts in a letter or a video[329] than it is to tinker with a well-established legal writing sub-genre. The purpose of the former is to salve grief, while the latter is meant to be an executory document relating to the transfer or property and wealth. Different purposes yield different genres. This is not to criticize Sneddon but to commend her. Her comprehensive analysis paves the way for understanding why genre analysis should be done and how legal sub-genres should be questioned. While suggesting breaking genres in an academic paper is acceptable; rejecting them in practice is simply *A Bridge Too Far*.

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[326] *Id.*

[327] *Id*.

[328] Sneddon, *In the Name of God*, *supra* note 181, at 691 (citing Gerry W. Beyer, *Statutory Will Methodologies—Incorporated Forums vs. Fill-In Forms: Rivalry or Peaceful Coexistence?*, 94 DICK. L. REV. 231, 289 (1990)).

[329] *See generally* Gerry W. Beyer, *Videotaping the Will Execution Ceremony—Preventing Frustration of the Testator's Final Wishes*, 15 ST. MARY'S L.J. 1 (1983).

VI. CONCLUSION

David Mellinkoff, in his classic book on legal language, affirmed the obvious that "the law is a profession of words."[330] While true, the law is also a profession of genres. Lawyers are the quintessential persuaders, and legal writing is their tool of the trade.[331] To be its most effective, that tool must generally fit within the genre that the reader's mind will most readily accept and process. A reader readily accepting and processing text is the function, and the consequence, of genre.[332] Genre stimulates, channels and accelerates cognition;[333] in other words, genre bias. Without those cognitive processes engaged by the legal texts, the next steps—acceptance (for transactional documents) and persuasion (for litigation documents)—become just that much higher.

This Article offers only the start of a discussion about genre bias and legal writing. Other issues need to be explored, including how genres originate and change—for surely they do. As professor Jamieson wrote forty years ago, "[b]y speaking of the effects of generic classification as generic constraints, this essay may have inadvertently suggested that generic classification is the boulder of Sisyphus to rhetors and critics. Such need not be the case. Genres should not be viewed as static forms but as evolving phenomena."[334]

But, if as this Article suggests, practitioners should not break the genre, then who initiates the change? In part, change comes from academia, and from the rule-makers, courts, and legislatures. Unlike lawyers, these participants in the legal writing genre do not answer to a client, and therefore, they are freer to stray. The plain language movement of the 1970s and 1980s is a good example of

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[330] MELLINKOFF, *supra* note 17, at vi.

[331] This is becoming an increasing reality as oral arguments are becoming less commonplace. *See* Flammer, *supra* note 297, at 280.

[332] *See* Jamieson, *supra* note 303, at 163 ("Genres are shaped in response to a rhetor's perception of the expectations of the audience and the demands of the situation.")

[333] *See supra* notes 125–32 and accompanying text.

[334] Jamieson, *supra* note 303, at 168.

how genre changes[335]—so too are modifications of rules of procedure.[336] Indeed, some argue that boilerplate can only change when the system is "shocked" by a change in the marketplace.[337] Sometimes it is a great lawyer, like Louis Brandeis, who reshapes the generic landscape.

The consequence of these changes, their causes, and their effectiveness are all issues that subsequent scholarship should address. Here, my only purpose is to have the reader appreciate that genre bias is a legal writer's hidden persuader. Nothing more. That genre, especially when used correctly, can gently channel the reader toward the writer's way of thinking. Genre is a cognitive bias and should be treated as such.

In their book, *Persuasion Across Genres*, professors Helena Halmari and Tuila Virtanen liken the cognitive process of what this Article calls genre bias to the Aesop fable of *The North Wind and the Sun*.[338] It is apt, and I will use it too:

> The North Wind and the Sun had a quarrel about which of them was the stronger. While they were disputing with much heat and bluster, a Traveler passed along the road wrapped in a cloak.
>
> "Let us agree," said the Sun, "that he is the

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[335] *See, e.g.*, BRYAN A. GARNER, THE ELEMENTS OF LEGAL STYLE 7–15 (1991); LAW REFORM COMMISSION OF VICTORIA, PLAIN ENGLISH AND THE LAW 45–52 (repr. 1990); Robert W. Benson, *The End of Legalese: The Game is Over*, 13 N.Y.U. REV. L. & SOC. CHANGE 519, 559–67 (1985); Joseph Kimble, *Plain English: A Charter for Clear Writing*, 9 T.M. COOLEY L. REV. 1, 19–22 (1992).

[336] The publication of cases online in the public domain, for example, has led the Illinois Supreme Court to change how cases are cited in briefs. The alteration of the extant genre requires briefs to now cite to the paragraph of a case (which court must include in their published opinions), as opposed to the page number. Ill. Sup. Ct. R. 6 ("For Illinois cases filed on or after July 1, 2011, and for any case not published in the Illinois Official Reports prior to that date and for which a public-domain citation has been assigned, the public-domain citation shall be given and, where appropriate, pinpoint citations to paragraph numbers shall be given; a citation to the North Eastern Reporter and/or the Illinois Decisions may be added but is not required.").

[337] *See* Stephen J. Choi et al., *The Dynamics of Contract Evolution*, 88 N.Y.U. L. REV. 1 (2013).

[338] PERSUASION ACROSS GENRES, *supra* note 11, at 243. Although the authors do not expressly call it "genre bias" but rather explain how "genres persuade via implicit means," there is an implicit cognitive process bias.

> stronger who can strip that Traveler of his cloak."
>
> "Very well," growled the North Wind, and at once sent a cold, howling blast against the Traveler.
>
> With the first gust of wind the ends of the cloak whipped about the Traveler's body. But he immediately wrapped it closely around him, and the harder the Wind blew, the tighter he held it to him. The North Wind tore angrily at the cloak, but all his efforts were in vain.
>
> Then the Sun began to shine. At first his beams were gentle, and in the pleasant warmth after the bitter cold of the North Wind, the Traveler unfastened his cloak and let it hang loosely from his shoulders. The Sun's rays grew warmer and warmer. The man took off his cap and mopped his brow. At last he became so heated that he pulled off his cloak, and, to escape the blazing sunshine, threw himself down in the welcome shade of a tree by the roadside.[339]

If you ignore the gentle force of the applicable legal sub-genre in the construction of a text, or try to force your way around it, like the North Wind, you will likely leave the reader's mind *wrapped closely* to pre-existing beliefs, and your efforts at securing acceptance and effecting persuasion may well be in *vane*.

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[339] *The North Wind and the Sun*, *in* AESOP'S FABLES FOR CHILDREN 141 (1919).